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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

In re:	)	
	)	Case No. 23-ap-1092-MBK
LTL MANAGEMENT LLC,	)	
	)	Lead BK Case: 23-12825-MBK
Debtor.	)	

MRHFM'S OPPOSITION TO DEBTOR'S MOTION TO EXTEND STAY / FOR PRELIM. INJUNCTION ON BEHALF OF RESPONDENTS KATHERINE TOLLEFSON, SANDRA WEATHERS, MARY JACKSON, ELIZABETH MEIKLE, MARZENA ZACHARA, ROBERT RADIN, AND CHRISTINE WOODFIN

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This Bankruptcy Court lacks subject matter jurisdiction and that will never change. As instructed by the Third Circuit ***in this case***, this Court must "start and stay" with "good faith": "only a putative debtor in financial distress" can enter bankruptcy's "safe harbor." *In re LTL Mgmt,* LLC, --- F.4th ----, 2023 WL 2760479, * 1 (3d Cir. 2023).

Johnson & Johnson and LTL are ***not*** here in good faith, so this Court cannot enjoin or stay actions against either and this case should be dismissed. It does ***not*** matter if 75% or more of alleged claimants purportedly support the unconstitutional and illegal "plan of reorganization" of a fabricated bad faith debtor. The Third Circuit already told this Court and the parties that "given Chapter 11's ability to redefine fundamental rights of third parties [cancer plaintiffs injured by J&J's asbestos-contaminated talc] only those facing financial distress can call on bankruptcy's tools to do so." *LTL Mgmt*, 2023 WL 2760479 at * 17.

Financial distress is required to obtain bankruptcy relief; this "safeguard ensures that claimants' pre-bankruptcy-remedies—here, the chance to prove to a jury of their peers injuries claimed to be caused by a consumer product—are disrupted only when necessary." *Id.* A second bad faith bankruptcy, filed less than 131 minutes after the first one was ordered to be dismissed under mandate from the Circuit, is ***not*** grounds to continue disrupting these remedies. Johnson & Johnson has already benefited from an 18-month-long injunction it was ***not*** entitled to. The Company took full advantage, giving away $18,000,000,000.00 in dividends while safely shielded from juries.[1] That's more than long enough.

This second bad faith bankruptcy will be dismissed. Between now and that time, will this Court—which committed clear error in LTL's favor once already—place the burden on the victims ***again***?

On April 5th, this Court granted a temporary restraining order of extraordinary breadth, barring nationwide court proceedings against (1) a debtor which had been dismissed a day earlier for filing a bankruptcy in bad faith, and (2) affiliated companies with independent, non-derivative tort liability, fully separate from the bad faith Debtor.

[1] The Company has 2,604,286,303 shares of Common Stock outstanding. Johnson & Johnson Annual Report 2022, Form 10-k, available at: https://www.investor.jnj.com/asm/2022-annual-report. The Company gives away $1.13 per share per quarter. This amounted to $4.45 per share in 2022. *See* Johnson & Johnson Dividend History, available at: https://johnsonandjohnson.gcs-web.com/stock-information/dividends-splits

American courts are at a standstill while this Court—which the Third Circuit ruled does ***not*** have power over an LTL bankruptcy—continues to credit corporate gamesmanship and ignore the interests of justice.

This Court cannot allow its TRO to become a preliminary injunction. Respondents object to the Debtor's request for unprecedented relief. *See* Adv. Pro. No. 23-1092-MBK, Dkt. 1 (Debtor Compl.) and Dkt. 2 (Debtor Mot.). This Court has neither the jurisdiction nor the discretion to enjoin lawsuits against non-debtors, especially under the circumstances here, on the heels of the Third Circuit's unambiguous and binding rejection of J&J's bankruptcy ploy.[2]

Katherine Tollefson, Sandra Weathers, Mary Jackson, Elizabeth Meikle, Marzena Zachara, Robert Radin, and Christine Woodfin ("Respondents"),[3] all victims of mesothelioma caused by exposure to Johnson & Johnson's asbestos-contaminated talc products, urge this Court to DENY Debtor's motion to broaden the automatic stay and to

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[2] Respondents incorporate by reference MRHFM's Statement Against LTL Management's Second Bankruptcy (No. 23-12825-MBK, Dkt. 97) and the Ad Hoc TCC's Informational Brief (Dkt. 79, which MRHFM joined in Dkt. 97), and asks the Court to consider these filings and argument by all counsel against the TRO, stay, preliminary injunction, and this case at the hearing of April 11, in ruling on the Debtor's request for a stay and preliminary injunction.

[3] *See* Appendix A to Debtor's Motion, Adv. Pro. No. 23-01092, Dkt. 1. Appendix A is filed in two parts. Part 1 (Dkt. 1-1) lists Mary Jackson (pg. 605). Part 2 (Dkt. 1-2) lists Katherine Tollefson (pg. 558), Sandra Weathers (pg. 623), Elizabeth Meikle (pg. 138), and Marzena Zachara (pg. 699). Robert Radin's and Christine Woodfin's lawsuits were filed in New Jersey state court after this Court dismissed *LTL I* on April 4th, but before it issued its TRO on April 5th.

DENY Debtor's alternative motion to enjoin nationwide court proceedings against all non-debtors (including Johnson & Johnson).[4]

I. BACKGROUND: A HALF-TRILLION DOLLAR TORTFEASOR, ITS MANUFACTURED BAD FAITH DEBTOR, AND THEIR DYING VICTIMS

Respondents[5] are Americans diagnosed with mesothelioma who have alleged, in state court, that they developed this aggressive, inevitably fatal cancer[6] from using Johnson & Johnson's talc products. Sandra Weathers was diagnosed on September 16, 2019: filed a state lawsuit on January 27, 2020; and was set for trial on January 31, 2022. Likewise, before *LTL1*, Mary Jackson had an April 2022 trial date, Elizabeth Meikle had a January 2022 trial date, and Marzena Zachara's case was set for trial in March 2022.[7] Katherine Tollefson—a prevailing party in the appellate proceedings that culminated in *LTL1's* dismissal—was diagnosed in April 2021.

Non-distressed non-debtor Johnson & Johnson created Debtor LTL Management LLC with the full expectation that LTL would file for bankruptcy. J&J attempted then, and attempts now, to hide behind this Court's equitable powers to protect ***itself*** from

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[4] Maune Raichle Hartley French & Mudd LLC ("MRHFM") only represents mesothelioma victims. The Firm represents seventy-nine plaintiffs with cases filed against Johnson & Johnson. Some of these complaints were filed after dismissal of *LTL1* but before *LTL2*. Sixty-one cases were filed as of the LTL's first bad faith bankruptcy petition in October 2021.

[5] Respondents hereby join in, and adopt the arguments of, the TCC's Opposition (Dkt. 39) and the U.S. Trustee's Opposition (Dkt. 38).

[6] *See Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 633 (3d Cir. 1996).

[7] *See* Ex. 1, Collected State Court Case Management Orders from Respondents' cases.

state tort cases. On January 30, the Third Circuit announced that LTL's petition merited dismissal.

A. <u>The Decision.</u>

The Third Circuit categorically rejected LTL's bankruptcy because "Chapter 11 is appropriate ***only*** for entities facing financial distress" and LTL was not. *LTL Mgmt.*, 2023 WL 2760479, at * 17 (emphasis here). A major factor in the Circuit's decision was the existence of the Funding Agreement reached before LTL's bankruptcy filing ("2021 FA"); the agreement provided a full backstop for LTL's assigned talc liability. The 2021 FA acted "not unlike an ATM disguised as a contract," *id.* at *16, and was an asset valued to be worth at least $61.5 billion, *id.* at *13–14. Critically, the Circuit held that J&J's belief "that this bankruptcy creates the best of all possible worlds for it and the talc claimants ***is not enough***, no matter how sincerely held."[8] *Id.* (emphasis here).

The Circuit announced on January 30th that "our decision dismisses the bankruptcy filing of a company created to file for bankruptcy." *Id.* at *17. This Court "abused its discretion in denying the motions to dismiss" and noted that dismissal

[8] Debtor's facile representations that the Third Circuit made a factual finding about LTL's "sincere belief" border on the laughable. The Third Circuit put that entire matter to the side because it could so easily dispense with the bankruptcy petition of a non-distressed debtor. The notion that a company now cares deeply about justice for the people it surreptitiously poisoned is risible, and rejected by Respondents here. *See Gaslight*, MERRIAM-WEBSTER ("to grossly mislead or deceive (someone) especially for one's own advantage"), https://www.merriam-webster.com/dictionary/gaslight.

"annuls the litigation stay ordered [by this Court] makes moot the need to decide that issue." *Id.* at *18. *LTL1* was dismissed on April 4th.

B. The Fraudulent Transfer.

Apparently, during February and March, while LTL and its *amici* were urging the Third Circuit to grant *en banc* review, and then to stay the mandate pending LTL's declared intention to petition for *certiorari* (No. 23-1092, Dkt. 4, Kim Decl. ¶ 70), J&J and the Debtor were conspiring about how LTL could rid itself of its $61.5 billion asset. (*See* Kim Decl. ¶¶ 78-81 and Termination and Substitution Agreement, Apr. 4, 2023 (Dkt. 4-4, Annex D)).

According to LTL, the Third Circuit decision defeated the purpose of the 2021 FA, which was to facilitate LTL's goal of resolving all current and future claims pursuant to Section 524(g) of the Bankruptcy Code. Kim Decl. ¶ 78. LTL says the Circuit's decision had the "exact opposite" effect of what LTL intended. *Id.* LTL now says, post-dismissal, there was material risk that the 2021 FA was no longer enforceable because it was void or voidable. *Id.*

To eliminate the alleged "risk" of the 2021 FA being void, LTL, J&J, and Holdco entered into new financing agreements. *Id.* Put another way, after telling the Third Circuit that the 2021 FA was enforceable inside and outside of bankruptcy and that $61 billion to file claims was a floor not a ceiling Ex. 2, Tr., Oral Arg. of Debtor, 9/19/2022, 83:21–24, LTL decided the 2021 FA's existence prevented LTL from manufacturing bankruptcy

court jurisdiction. So LTL and J&J perpetrated a fraudulent transfer rather than defend themselves before juries. Tellingly, Johnson & Johnson—at least when lawyers were not involved—never refused to honor the 2021 FA. Ex. 3, Dep. of John Kim, 4/14/2023, 209:9–17, 210:7–18.

The 2023 Funding Agreement ("2023 FA") is between LTL and HoldCo (not Johnson & Johnson), and operates in ***or out*** of bankruptcy. Kim Decl. ¶ 81. A second arrangement, a so-called J&J Support Agreement, is subject to this Court's approval and is operative only in the Chapter 11 case. *Id.* The Debtor contends these changes "resolve the concerns" that lead the Third Circuit to dismiss *LTL1*. Yet, the 2023 FA is worth $30 billion through HoldCo, and LTL has access to these funds inside or outside of bankruptcy. Ex. 3, 67:22-68:6, 68:19-69:14, 72:9-21. So, LTL and J&J committed a fraudulent transfer by squandering $30 billion to hide it from the estate, and LTL is still not in financial distress. The Third Circuit found that LTL's liabilities over the next 24 months are $2.4 billion. *LTL Mgmt*, 2023 WL 2760479, at *3.[9]

C. <u>The Third Circuit Foresaw This.</u>

The Third Circuit presciently addressed the potential for fraudulent transfer between LTL and J&J in the future:

[9] While Mr. Kim maintains his belief that LTL is in financial distress in *LTL2*, the basis for this assertion is no different than the reasons this Court expressed in February 2022. Ex. 3 at 205:14–206:5.

> Some might read our logic to suggest LTL need only part with its funding backstop to render itself fit for a renewed filing. While this question is … premature, we note interested parties may seek to avoid any transfer made within two years of any bankruptcy filing by a debtor who receives less than a reasonably equivalent value in exchange for such transfer and became insolvent as a result of it.

LTL Mgmt., 2023 WL 2760479, at *16 n.18. LTL appears to have received no consideration for giving away its largest asset (the 2021 FA), and has obviously breached its duty to maximize the Estate's assets. These are not "clean hands." *See In re SGL Carbon Corp.*, 200 F.3d 154, 161 (3d Cir. 1999). And yet even after committing a fraudulent transfer, the Debtor still has over $27 billion more than it needs to defend and resolve talc claims over at least the next 24 months.

II. ARGUMENT

Bankruptcy courts are of expressly limited subject matter jurisdiction. This Court wholly lacks the power to (1) maintain jurisdiction over this bad faith Chapter 11 proceeding or (2) to enjoin state court claims against non-debtors with independent, non-derivative tort liability. Even if both jurisdictional hurdles could be cleared, any injunctive relief in favor of non-debtors would violate the preliminary injunction standard, which seeks to maintain the status quo until a merits decision is reached. The status quo is that LTL, at the time of filing its second petition, had been branded a bad faith debtor by the Third Circuit. Granting LTL injunctive relief would upend the status quo in favor of a judicially recognized bad faith debtor.

A. No Financial Distress = No Bankruptcy Jurisdiction. This Court Lacks Power to do Anything but Dismiss.

The Third Circuit categorically rejected LTL's first bankruptcy because LTL was not in financial distress. And "Chapter 11 is appropriate ***only*** for entities facing financial distress." *LTL Mgmt.,* 2023 WL 2760479 at *17 (emphasis). A financially un-distressed company cannot file a Chapter 11 petition in good faith. *Id.* at *9 (citing *In re Integrated Telecom Express, Inc.*, 384 F.3d 108, 122 (3d Cir. 2004), and *SGL Carbon Corp.*, 200 F.3d 154 at 166. [10]

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[10] *See also Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) ("One of the primary purposes of the Bankruptcy Act is to relieve the honest debtor from *the weight of oppressive indebtedness*, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.") (emphasis added); *Wetmore v. Markoe*, 196 U.S. 68, 77 (1904) ("Systems of bankruptcy are designed to relieve the honest debtor from the weight of indebtedness which has become oppressive…"); *In re Capitol Food Corp. of Fields Corner*, 490 F.3d 21, 25 (1st Cir. 2007) (reasoning that a debtor need not be insolvent before filing bankruptcy petition, but that it must be experiencing "some sort of financial distress"); *In re Cohoes Indus. Terminal, Inc.*, 931 F.2d 222, 228 (2d Cir. 1991) (debtor must "at least…face such financial difficulty that, if it did not file at that time, it could anticipate the need to file in the future"); *In re SGL Carbon Corp.*, 200 F.3d 154, 164–66 (3d Cir. 1999) (reversing the district court and dismissing the debtor's bankruptcy because, *inter alia*, "[t]he mere possibility of a future need to file, without more, does not establish that a petition was filed in 'good faith," and "Chapter 11 was designed to give those teetering on the verge of a fatal financial plummet an opportunity to reorganize on solid ground and try again, not to give profitable enterprises an opportunity to evade contractual or other liabilities"); *In re Premier Auto. Servs., Inc.*, 492 F.3d 274, 280–81 (4th Cir. 2007) (dismissal upheld because debtor was not "experiencing financial difficulties;" the debtor's filings "reveal a solvent business entity," a fact that "alone may justify dismissal of [the debtor's] Chapter 11 petition"); *In re Little Creek Dev. Co.*, 779 F.2d 1068, 1072–73 (5th Cir. 1986) ("The 'new debtor' syndrome, in which a one-asset entity has been created … to isolate the insolvent property and its creditors, exemplifies … bad faith cases…Neither the bankruptcy courts nor the creditors should be subjected to the costs and delays of a bankruptcy proceeding under such conditions."); *In re Cook*, 104 F.2d 981, 985 (7th Cir. 1939) (no valid bankruptcy purpose where "proceeding was instituted not for the purpose of obtaining benefits afforded by the Act to a corporation in financial distress, but to enable appellees to escape the jurisdiction of another court where the day of reckoning … was at hand"; "A Federal Court should not extend its jurisdiction under such circumstances."); *In re Cedar Shore Resort, Inc.*, 235 F.3d 375, 380 (8th Cir. 2000) (affirming dismissal because, *inter alia*, the bankruptcy court found the primary motivation of the debtor—a healthy company "not in dire financial straits"—was to dispose of a state court lawsuit); *In re Marsch*, 36 F.3d 825, 829 (9th Cir. 1994) (no good faith where debtor "had the financial means to pay" its obligations, which

The good faith requirement is a jurisdictional one, protecting the powerful equitable weapons of bankruptcy from misuse by a debtor who lacks "clean hands." *SGL Carbon*, 200 F.3d at 161 (quoting *In re Little Creek Dev. Co.*, 779 F.2d 1068, 1072 (5th Cir. 1986)). The ***Debtor*** has the burden to establish good faith (and financial distress). *LTL1*, 2023 WL 2760479, at *8. Here, LTL's lack of distress has not changed, even after LTL's fraudulent conveyance of giving away the full value of New JJCI under 2021 FA, so the analysis is simple: as in *LTL1*, *LTL2* must be dismissed.

LTL's asserted goal of global settlement, and this Court's stated desire to foster such a settlement, are irrelevant because they cannot bestow jurisdiction. When a debtor's lack of good faith becomes apparent—as it already has here—dismissal must follow immediately and the Court lacks jurisdiction to take any other action. An alleged "settlement" between the Debtor and 60,000 purported "claimants" does not give this Court jurisdiction it otherwise does not have and does not permit LTL, let alone J&J, to enter the safe harbor of bankruptcy. *LTL Mgmt,* 2023 WL 2760479, at * 1.

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posed no "danger of disrupting business interests"); *In re Stewart*, 175 F.3d 796, 811 (10th Cir. 1999) (affirming dismissal and recognizing that relieving "oppressive indebtedness" is "[o]ne of the main purposes of bankruptcy law"); *In re Waldron*, 785 F.2d 936, 940 (11th Cir. 1986) (rejecting a debtor's bankruptcy because "[t]he bankruptcy laws are intended as a shield, not as a sword," and recognizing that the purpose of Chapter 11 is to give a fresh start to a "financially troubled debtor" rather than the "financially secure"). *See also Grogan v. Garner*, 498 U.S. 279, 286–87 (1991) ("This Court has certainly acknowledged that a central purpose of the Code is to provide a procedure by which *certain insolvent* debtors can reorder their affairs … But in the same breath that we have invoked this 'fresh start' policy, we have been careful to explain that the Act limits the opportunity for a completely unencumbered new beginning to the 'honest *but unfortunate* debtor.'") (emphasis added).

1. LTL Admits it has at least the same ability to fund talc-related claims as Old JJCI had before the 2021 Restructuring. Under In re LTL, LTL still faces no financial distress, and the instant Petition lacks good faith.

The 2023 FA is worth $30 billion, and LTL has access to these funds inside ***or*** outside of bankruptcy. Ex. 3, 67:22-68:6, 68:19-69:14, 72:9-21. LTL's representative confirms that LTL, today, has "at least the same, if not greater, ability to fund talc-related claims and other liabilities as Old JJCI had before the prior restructuring." *Id.* at 64:14–18. The Third Circuit found that LTL's liabilities were $2.4 billion over the next 24 months. *LTL Mgmt,* 2023 WL 2760479, at *3. Under the Third Circuit's binding precedent, these facts ***by themselves*** warrant immediate dismissal and bar this Court from enjoining any actions against non-debtors.

When speaking to the American Bankruptcy Institute conference in April 2022, Debtor's Counsel, Mr. Gregory Gordon said the wealthy tortfeasor bankruptcy ploy known as the Texas Two Step, is intended to "overcome the tort system" without "the obligations of a bankruptcy filing." Ex. 4, Am. Bankr. Institute: Annual Spring Meeting (Texas Two Step), at 40, 50. Tellingly, Mr. Gordon said "the most important thing" in Two Steps is "there [is] a funding agreement that was put in place between the entities that it split….the idea was, and these companies [including J&J] all felt the same way [ ] we would like to avoid an argument that there was any kind of fraudulent transfer here. So we're not interested in ***putting a cap on the funding agreement***." *Id.* at 18 (emphasis added).

"We'd like to do it in a way where we can say to the claimants and say to the court, look, the ***same assets*** that were available before the Chapter 11 to support the payment of these claims are available post the Chapter 11." *Id.* at 19 (emphasis added). Here, a "very large company," Old Johnson & Johnson Consumer Inc., was split and "the entirety of its assets remain available…J&J itself agreed to become a co-obligor on the funding agreement to the extent of the value of [Old JJCI] and that was just to provide further comfort that assets—the assets would be available." *Id.* at 21.

But these statements were before the Third Circuit held that LTL filed in bad faith. Then the 2021 FA was less "important" to the Debtor as was having the "same assets" in or out of bankruptcy. The remedy for fraudulent conveyance is unwinding the recent transactions, but the Court doesn't need to reach that issue now. LTL still is not close to being in financial distress, and because Chapter 11 is only appropriate for companies in financial distress, LTL has no access to the powerful equitable weapons of bankruptcy. The end.[11]

Therefore, this Court accordingly has no jurisdiction over LTL's instant Petition. Dkt. 1. That was true the day LTL filed; it is true today; it will be true tomorrow. It is true no matter how many alleged victims of J&J's asbestos-contaminated talc say they would

[11] J&J settled nearly 7,000 cases in the tort system over several years for less than it gives away in *one month* in dividends. *See* Ex. 5, Debtor's Supplemental Resp. to Official Committee of Talc Claimants' RPD No. 40.

prefer bankruptcy to courts of general jurisdiction.[12] Binding precedent from LTL's first bad faith bankruptcy means this one must be dismissed too.

2. Dismissal must be immediate.

Apparently, in the aftermath of the Circuit's decision, there was a consensus among the lawyers for LTL and J&J that 2021 FA wasn't important anymore and could be voided. *See* Ex. 3, Kim Tr., 181:4-9. What happened next was that Mr. Kim and his LTL "colleagues" gave away a $61.5 billion asset. Such squandering of resources to engage the machinery of bankruptcy courts is indicia of bad faith meriting dismissal.

The Third Circuit cited and relied upon *SGL Carbon* for its holding that LTL's first Chapter 11 petition lacked good faith. In turn, *SGL Carbon* invoked *In re Marsch* in its review of the nationwide rule forbidding non-distressed debtors from bankruptcy relief. *SGL Carbon*, 200 F.3d at 160–61, 162, 163, 165, 166. *Marsch* is instructive here.

In *Marsch*, the bankruptcy court found a debtor filed in bad faith: the debtor filed to avoid paying a judgment / posting an appeal bond that he could easily afford to pay. *In re Marsch*, 36 F.3d 825, 827, 829 (9th Cir. 1994). Though the bankruptcy court found bad faith, it gave the debtor 60 days to liquidate assets and pay his debts before dismissal. *In re Marsch*, 36 F.3d at 827–28. The bankruptcy court "thought it had discretion to delay

[12] It should have also prompted this Court to dismiss *sua sponte*. The continued exercise of jurisdiction over this case is both an affront to justice and, given the Court's duty to be concerned with its own subject matter jurisdiction before it considers subsequent matters like settlement, clear error.

dismissal to allow debtor to conduct an orderly liquidation." *Id.* at 829. But "[i]n this the bankruptcy court erred; *immediate dismissal was the only appropriate course once the court found that the petition was filed without a legitimate purpose*." *Id* (emphasis added).

Here, like the debtor in *Marsch*, both LTL and the Court seem to want to put the cart—forced settlement and the establishment of a § 524(g) trust—before the horse. But the sincere desire to use one of bankruptcy's tools does not magically bestow a valid bankruptcy purpose upon a bad faith bankruptcy, or empower this Court with jurisdiction it does not have. This Court has no power over LTL's second Petition. It must police its jurisdiction and dismiss immediately. This action—clearly required under direct Third Circuit precedent—would moot all requests for injunctive relief.

B. <u>This Court Does Not Have Jurisdiction to Issue Preliminary or Permanent Injunctive Relief To Non-Debtors With Independent Liability.</u>

Even if the Court had jurisdiction over this bad faith bankruptcy—which it does not—there is no authority granting the Court the power to enjoin nationwide litigation as the Debtor seeks. *See In re Phoenix Piccadilly*, 849 F.2d 1393, 1394 (11th Cir. 1988) ("what amounts to bad faith is the same for both proceedings"—lifting stay for cause due to bad faith under § 362 and dismissing case for lack of good faith under § 1112). LTL seeks a stay under 362(a) benefitting itself and almost 150 "protected parties," and/or a preliminary injunction for the same under section 105(a). Kim Decl. ¶ 105. The stay and preliminary injunction are "critical" to the Debtor's ability to "equitably" and

permanently resolve all talc claims. *Id.* ¶ 107. If not given this relief, LTL contends it would "defeat the purpose" of this bankruptcy filing, "cause irreparable harm" to the Debtor's Estate, and "undermine or circumvent" the purpose of the automatic stay and preliminary injunction and divert the Debtor from reorganization efforts. Kim Decl. ¶ 107.

Neither 362(a) nor 105(a) grant this Court the sweeping authority demanded by Debtor. Quite simply—and dispositive by itself—an injunction barring state court litigation facially violates 28 U.S.C. § 2283, the Anti-Injunction Act.[13] This statute was referenced expressly by the 7th Circuit panel at oral argument in 3M's bankruptcy scheme on April 4th.[14] The 3M/Aearo ploy is materially indistinguishable from Johnson & Johnson's, as it aims to provide injunctive relief from a bankruptcy court to protect non-distressed non-debtors (with independent tort liability) from facing justice in courts of general jurisdiction. In exercising its statutory (and inherent) powers, bankruptcy courts "may not contravene specific statutory provisions" like the Anti-Injunction Act. *Law v. Siegel*, 571 U.S. 415, 420–21 (2014).

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[13] "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

[14] Ex. 6, *In re Aearo Technologies, LLC*, Tr. of Oral Argument, April 4, 2023, at 15 (Easterbrook, J.: "Certainly 2283, which says expressly authorized by law, you don't see any express authorization for injunctions against state litigation in section 105"); at 17 (Hamilton, J.: "The bankruptcy code in other chapters does provide for automatic stays to extend to related parties in 1201 and 1301. We don't see that kind of language in 362 or in Chapter 11. Shouldn't that give us pause?").

Here, even if this were a good-faith bankruptcy, the Court's extraordinary TRO and potential preliminary injunction cannot be rooted anywhere in the Court's limited statutory powers. The injunction sought by the Debtor sweeps far beyond talc claims against LTL, barring good faith litigation against scores of non-debtors (including J&J) for their own independent liability. No statute authorizes that expansive exercise of power, and precedents binding on this Court flatly forbid it.

1. Section 362(a)'s automatic stay does not cover claims against non-debtors.

Section 362(a)(1) provides that the filing of a bankruptcy petition "operates as a stay" of any accrued action "against the debtor" or "to recover a claim against the debtor." 11 U.S.C. § 362(a)(1). The automatic stay also covers "any act to obtain possession of," or "exercise control over," "property of the estate." *Id.* § 362(a)(3).

By their terms, these provisions do not apply here. "[T]he clear language of section 362(a) stays actions only against a 'debtor.'" *McCartney v. Integra Nat'l Bank N.*, 106 F.3d 506, 509 (3d. Cir. 1997). It is thus "universally acknowledged" that the stay does not include suits against non-debtors for their own liability, like those LTL asks the Court to enjoin here. *Id.* The only time the Third Circuit has interpreted the statute to reach a claim against a non-debtor is when prosecuting the claim would have required, by operation of state law, the debtor's "necessary participation" as a defendant. *Id.* at 511. Because that isn't the case here, section 362(a)(1) does not apply.

Nor does section 362(a)(3). The only "property of the estate" even arguably implicated by third-party litigation are insurance policies shared by LTL and some non-debtors. The existence of these policies, however, does not trigger the automatic stay even for claims against those non-debtors. This Court acknowledged in its Opinion on the preliminary injunction in *LTL1* that "a court must make adequate factual findings before staying proceedings against non-debtor co-insureds on the theory that asbestos-related personal injury claims against the non-debtors will automatically deplete the insurance proceeds available to the debtor and, thus, reduce the assets available to the bankruptcy estate." *In re LTL Management, LLC*, 638 B.R. 291, 318–19 (Bankr. N.J. 2022) (*citing In re Combustion Eng'g*, 391 F.3d 190, 233 (3d Cir. 2004)).

But this Court made no such findings in *LTL1*, and cannot make them here. *See id.* Far from concluding that insurance proceeds would be "automatically" depleted, the Court "[a]dmitted[]" that "coverage is disputed" and did not deny that the liabilities had already exceeded any such coverage. *Id.* at 303. It granted sweeping relief in 2022 despite acknowledging that it made "no definitive determination … as to exhaustion," *id.*, and there's a "chance" that LTL "could later prevail with respect to its insurance coverage demands," *Id.* at 319. That was not enough to bring those claims within section 362(a)(3)'s automatic stay then, and it is not enough now.

Acknowledging as much, this Court treated the question before it as "whether to extend the stay" *beyond* what section 362(a) provides. *Id.*, *passim*. But the statute's text

(and guiding case law) answers this question too. Section 362(a) grants "no authority" to bankruptcy judges. *In re Canter*, 299 F.3d 1150, 1155 n.1 (9th Cir. 2002). Instead, it describes the *effect* of filing a petition: it "operates as a stay." 11 U.S.C. § 362(a). The stay is an "automatic consequence of the filing of a bankruptcy petition," imposed directly by section 362. *Chicago v. Fulton*, 141 S. Ct. 585, 589 (2021). Because it is "automatic" and "self-executing," *Gruntz v. Cnty. of Los Angeles*, 202 F.3d 1074, 1081 (9th Cir. 2000) (en banc), it "differ[s] from a bankruptcy court-ordered injunction, which issues under 11 U.S.C. § 105," *Canter*, 299 F.3d at 1155 n.1.

Section 362(a) contains no exception for "unusual circumstances" that would empower bankruptcy courts to expand its scope. Instead, as the Eighth Circuit has explained, "where an 'unusual-circumstances' 'exception' would be needed to justify extension of the automatic stay, § 105 is the more appropriate source of authority for assessing the propriety of a stay," and "a stay issued pursuant to that section should be treated as an injunction." *In re Panther Mountain Land Dev., LLC*, 686 F.3d 916, 926–27 (8th Cir. 2012). The automatic mechanism of Section 362(a) cannot be the basis to extend discretionary injunctive relief in the way LTL asks.

2. Section 105 does not give this Court jurisdiction to enjoin talc claims against non-debtors.

Section 105 authorizes bankruptcy courts to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a).

But it "does not provide an independent source of federal subject matter jurisdiction." *Combustion Eng'g*, 391 F.3d at 224–25. The dispositive question, then, is whether this court has jurisdiction to enjoin claims against non-debtors. Under binding Third Circuit precedent, it does not.

Congress has granted bankruptcy court jurisdiction over only two kinds of proceedings: (1) core proceedings and (2) proceedings "related to" core proceedings. 28 U.S.C. § 1334(b); *id.* § 157(a). The enjoined claims against non-debtors are neither.

a) The Debtor has not established core jurisdiction.

This Court previously held that it had jurisdiction over talc claims against non-debtors because LTL "invokes a substantive right under the Bankruptcy Code" and LTL's adversary proceeding, "by its nature, could arise only in the context of a bankruptcy case," making it a core proceeding. 638 B.R. 291, 302–03. In other words, the Court reasoned that jurisdiction over the adversary proceeding in a Chapter 11 case is sufficient to provide it with a basis for expanding the § 105(a) injunction.

The Third Circuit rejected this argument in *W.R. Grace*. The question isn't whether the *adversary proceeding* is a core proceeding, but whether the claims sought to be enjoined are core proceedings. *In re W.R. Grace & Co.*, 591 F.3d 164, 174 (3d Cir. 2009). Otherwise, "a bankruptcy court would have power to enjoin any action, no matter how unrelated to the underlying bankruptcy it may be, so long as the injunction motion was filed in the adversary proceeding." *Id.* "The existence of a bankruptcy proceeding itself," however,

is not "an all-purpose grant of jurisdiction." *Id. See also Stoe v. Flaherty*, 436 F.3d 209, 217 (3d Cir. 2006). "It is hornbook law that § 105(a) does not allow the bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code … Section 105(a) confers authority to 'carry out' the provisions of the Code, but it is quite impossible to do that by taking action that the Code prohibits." *Law v. Siegel*, 571 U.S. 415, 420–21 (2014).

Talc claims against non-debtors are not "core" proceedings. Hence, there is no basis for exercising core jurisdiction over them.

b) The Debtor has not established related-to jurisdiction.

That leaves related-to jurisdiction, which encompasses "suits between third parties" that "have an effect on the bankruptcy estate." *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 n.5 (1995). Four times—in *Pacor, Inc. v. Higgins*, 743 F.2d 984, 986 (3d Cir. 1984), *In re Federal-Mogul Glob. Inc.*, 300 F.3d 382 (3d Cir. 2002), *Combustion Eng'g*, and *W.R. Grace*—the Third Circuit has enforced strict limits on "related-to" bankruptcy jurisdiction. Four times, the Circuit has rejected efforts to enjoin asbestos suits against non-debtors under "related-to" jurisdiction, even where the suits might trigger indemnification claims against the debtor. *Id*.

Talc lawsuits against non-debtors for their own liability do not affect the Estate. Although LTL points to J&J's agreement to indemnify a previous subsidiary, the agreement covers only liabilities "on the books or records of J&J" in 1979—not future

liabilities.[15] 638 B.R. 291, 309. That is the only interpretation that gives this language meaning. *See Wash. Constr. Co. v. Spinella*, 8 N.J. 212, 217–18 (1951). And even if it were ambiguous, as this Court has recognized, ambiguity is construed against indemnification. 638 B.R. at 310. *See also In re LTL Mgmt.*, 2023 WL 2760479, at *15 n. 16 ("…it is not obvious LTL must indemnify J&J for the latter's independent, post-1979 conduct that is the basis of a verdict rendered against it"). Thus, LTL has no legal obligation to indemnify J&J. Its attempt to concede an obligation it does not have is further evidence of bad faith.

The Third Circuit has "rejected 'related to' jurisdiction over third-party claims involving asbestos or asbestos-containing products supplied by the debtor when the third-party claim did not directly result in liability for the debtor." *Combustion Eng'g*, 391 F.3d at 231; *see W.R. Grace*, 591 F.3d at 171–73. It has done so even when non-debtors might later have indemnity claims against the debtor. *Id.* Whenever hypothetical "indemnification claims against" the debtor "would require the intervention of another lawsuit to affect the bankruptcy estate," the claims "cannot provide a basis for 'related to' jurisdiction" because their resolution, by itself, does not affect the estate. *Combustion Eng'g*, 391 F.3d at 232.

As a result, Third Circuit "precedent dictates that a bankruptcy court lacks subject matter jurisdiction over a third-party action if the only way in which that third-party

[15] There is no other "record evidence of an indemnity obligation" beyond the 1979 agreement. *Combustion Eng'g*, 391 F.3d at 224 n.35.

action could have an impact on the debtor's estate is through the intervention of yet another lawsuit." *W.R. Grace*, 591 F.3d at 173.

Third Circuit precedent controls here. The enjoined actions seek to hold non-debtors liable as joint tort-feasors, so any judgment(s) wouldn't bind LTL. Those actions might later give rise to an indemnification claim asserted against LTL by the non-debtor for any judgment it paid, but that possibility isn't enough under this Court's cases.[16]

Moreover, contingent indemnification claims are disallowed in bankruptcy, so they cannot affect the estate. 11 U.S.C. § 502(e)(1)(B). And even if a non-debtor were eventually to pay a judgment, it would still have no effect on the estate. In that scenario, the non-debtor would have a right to take over the plaintiff's separate claim against LTL via subrogation. *Id.* ¶ § 509(a). But swapping one claimant for another has no effect on the estate, much less a "direct and substantial adverse effect." *Celotex*, 514 U.S. at 310; *see*

[16] The Third Circuit has indicated that a "clear contractual right" to indemnity could confer jurisdiction if liability were "automatic." *W.R. Grace*, 591 F.3d at 173; *see Combustion Eng'g*, 391 F.3d at 226. But it hasn't explained why, and Debtor has adduced no evidence to establish "automatic" liability exists between itself and any non-debtor. Even so, this Court recognized that no "clear" right exists here. It analyzed just one indemnity clause (the 1979 J&J agreement) and found it "to be ambiguous" about "future liability." 638 B.R. at 310. The Court then noted that "any ambiguity" is "construed in favor of … the indemnitor"—that is, *against* indemnification. *Id.* Although the court tried to overcome this textual barrier by relying on *Bouton v. Litton Indus., Inc.*, 423 F.2d 643 (3d Cir. 1970), and the parties' course of dealing, the contract in *Bouton* involved a far broader transfer of liability, *id.* at 648, while internal allocations are "accounting decision[s]" for "administrative convenience" that do not prove *legal liability* to talc claimants. At the very least, LTL has a legitimate argument against indemnification. As debtor in possession and fiduciary of the estate, it cannot unilaterally forfeit that potential argument without committing yet another act of bad faith.

Levitin, *Bankruptcy Markets: Making Sense of Bankruptcy Claims Trading*, 4 Brook. J. Corp. Fin. & Com. L. 64, 74 (2010) (discussing market for claims trading).

Under the 2021 FA, LTL had the contractual right to look to J&J and New JJCI as primary obligors," without having to establish independent liability, "—to fund claims against LTL, including talc-related indemnification claims. *See* No. 21-30589-MBK, Dkt. 956, *passim*. Here, under 2023 FA, if J&J or New JJCI were to tender an adverse talc judgment to LTL, LTL would simply tender that liability to HoldCo and provide payment to J&J and New JJCI—a circular flow that both avoids any impact on reorganization and shows how contrived the indemnity is.

J&J had no right to indemnity from LTL's predecessor, Old JJCI; as a result, LTL could not have inherited such an obligation. This Court interpreted a 1979 agreement as having transferred J&J's talc-related liabilities to Old JJCI. 638 B.R. at 309. But the 1979 Agreement stated that Baby Products Company (Old JJCI's predecessor) would assume "all the indebtedness, liabilities and obligations of every kind and description which are allocated on the books or records of J&J as pertaining to its BABY Division." *Id.* And the record is devoid of evidence that any talc claims were "allocated on the books or records of J&J" in 1979. The first talc-related tort case was not filed against J&J until 1982. No. 21-30589, Dkt. 3, 48.

This Court earlier found the 1979 indemnity provision "ambiguous," 638 B.R. at 310, but failed to construe that ambiguity against the indemnitee (here J&J) as New Jersey

law requires. *See Kieffer v. Best Buy*, 14 A.3d 737, 743 (N.J. 2011). Likewise, the Court ignored New Jersey's rule against a promise to indemnify against one's own negligence. *See Cozzi v. Owens-Corning Fiber Glass Corp*., 164 A.2d 69 (N.J. Super. 1960); *Mantilla v. NC Mall Assoc*., 770 A.2d 1144 (N.J. 2001). Johnson & Johnson was found by juries to have engaged in willful, wanton, or reckless conduct warranting punitive damages. Such conduct *cannot be indemnified*. *See Johnson & Johnson v. Aetna*, 667 A.2d 1087 (NJ Super. 1995). *See also Tryanowski v. Lodi Bd. Of Educ*., 643 A.2d 1057 (N.J. Super. 1994).

Even if Old JJCI did "assume all liabilities" relating to J&J's talcum powder products, that assumption would not alter J&J's status as a joint tortfeasor. It is settled law that "[c]orporations cannot discharge liabilities for their torts against third parties through contract." *Jaycox v. Terex Corp.*, No. 4:19-CV-02650 SRC, 2021 WL 2187907, *12 (E.D. Mo. May 28, 2021). Hence, "[e]ven if a successor assumes the tort liability of the predecessor through an asset purchase agreement, a plaintiff may still bring a claim against the predecessor." *Id.* (*citing* 15 Fletcher's Cyclopedia of the Law of Corporations § 7123 (2020)).

That very result has been recognized in an asbestos bankruptcy in this circuit. In *In re Federal-Mogul*, one asbestos defendant (Pneumo Abex, a brake manufacturer) attempted to secure relief under § 524(g) because it had entered into an indemnification with the debtor (Federal Mogul). *In re Federal-Mogul Global Inc.*, 411 B.R. 148, 161–67 (Bankr. D. Del. 2008). "The indemnity provisions allocated liabilities between [Federal

Mogul] and Pneumo Abex. They did not impact the claims against either party that may be brought directly by an asbestos claimant." *Id.* at 161. Because lawsuits against Pneumo Abex "do not derive in any way from the liability of the Debtors, they cannot be enjoined and channeled under § 524(g)." *Id.* at 166.

At worst, LTL has an excellent argument against indemnification. It only ignores that argument because LTL exists only to protect the equity of its corporate masters, and it is not interested in adhering to its fiduciary duty to maximize estate assets. But as debtor in possession and fiduciary of the estate, it cannot unilaterally forfeit its potential argument without committing yet another act of bad faith.

As for the scores of other non-debtors, LTL has adduced insufficient evidence that a non-contingent agreement exists as to each of them. So it cannot overcome the "presum[ption] that federal courts lack jurisdiction unless the contrary appears affirmatively from the record." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006).

Here, the Court simply has no statutory authority to enjoin nationwide litigation against non-debtors. Even if it did, such an injunction would be a gross abuse of discretion.

C. Enjoining Nationwide Court Proceedings: a Gross Abuse of Discretion.

Preliminary injunctions—even ones that do not grind nationwide litigation to a halt—are extraordinary remedies. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). A movant must accordingly—by a clear showing—carry the burden of persuasion. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). The standard has four parts: (1) the movant must demonstrate it is reasonably likely "to prevail eventually in the litigation" and that (2) that they are likely to suffer irreparable injury without relief. *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 157 (3d Cir. 2002). If those two threshold requirements are met, the Court must consider (3) whether an injunction would harm the movants more than denying relief would harm the non-movant, and (4) whether granting injunctive relief would serve the public interest. *Id. See also Winter*, 555 U.S. at 20.

Given the extraordinary nature of preliminary injunctive relief, the burden of proof is on the movant—here the Debtor—to establish, by clear and convincing evidence, each of the foregoing elements to obtain a preliminary injunction. *See Mazurek v. Armstrong*, 520 U.S. at 972.

In that vein, speculation is not enough for an injunction. "It is not enough for the movant to show some limited risk, or that there is a theoretical threat to the reorganization. . . Rather, and in keeping with the principle that extending the stay to non-debtors is extraordinary relief, the party seeking extension of the stay must put forth

real evidence demonstrating an actual impact upon, or threat to, the reorganization efforts if the stay is not extended." *FPSDA I, LLC*, 2012 WL 6681794, at *8. *Accord Winter*, 555 U.S. at 22 ("Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the [movant] is entitled to such relief.").

Here, the Debtor has not come close to meeting its heavy burden. Debtor meets none of the four equitable factors.

1. ***Zero likelihood of success on the merits: Debtor's bankruptcy will fail for lack of good faith either because it is not financially distressed, or because any financial distress stems from a § 548 fraudulent transfer. In either case, Debtor is judicially estopped from relief.***

This bankruptcy will fail, either because this Court correctly recognizes it does not have jurisdiction to wield its equitable tools on behalf of a bad faith debtor, or because it will fail to do so and get reversed again.

There are only two logical positions for LTL to take, and both lead to dismissal. On one hand, LTL swears under oath that it believes it has the same, "if not greater," ability to pay its talc-related liabilities as Old JJCI had before the prior restructuring (and therefore as LTL had during the pendency of *LTL1*). Ex. 3, Kim. Tr., 64:14–18. That binding admission ends LTL's second Chapter 11 petition, and any equitable relief that could hypothetically flow from it. *See* Section II.A, *supra*.

On the other hand, LTL hints that—because it squandered a $60 billion asset—it is somehow less financially robust as it was during *LTL1*, and that it now faces financial distress. But the Third Circuit addressed such malfeasance in its rejection of *LTL1*: "interested parties may seek to avoid any transfer made within two years of any bankruptcy filing by a debtor who receives less than a reasonably equivalent value in exchange for such transfer and became insolvent as a result of it." *LTL Mgmt.*, 2023 WL 2760479, at *16 n.18 (citing 11 U.S.C. § 548 – "Fraudulent transfers and obligations"). LTL's inexplicable abandonment of an asset that the Third Circuit recognized was worth over $60 billion will not withstand scrutiny under § 548. And avoidance of LTL's retreat from the first funding agreement will put LTL precisely where it was during *LTL1*, and lead to the same result: dismissal of a non-distressed debtor for filing a bankruptcy that lacked good faith.

In granting LTL (and scores of non-debtors) an *ex parte* TRO, the Court credited LTL's primary argument during this successive bankruptcy: that "a potential resolution favorable to all claimants" makes the Court "wish[ ] to examine whether this litigation (and others like it) should go forward." No. 23-1092-MBK, Dkt. 15, 7. But the Court's wishes cannot empower it to grant relief in a bad faith bankruptcy; the alleged approval of 60,000 (alleged) potential claimants cannot overcome the jurisdictional bar created by LTL's lack of good faith; Johnson & Johnson's adamant desire for a permanent resolution of its tort liabilities cannot substitute for statutory authority; and the general availability

of § 524(g) for *good faith* debtors does not act as some sort of escape hatch for a bad faith Debtor trying to claim it can round the bases into a § 524(g) trust. The Third Circuit has already had its say: *LTL2* doesn't get out of the batter's box.

Even if the Court had power to entertain *LTL2*, the notion that non-debtors are entitled to a final channeling injunction under § 524(g) is misguided. Section 524(g) provides:

> (g)(1)(A) After notice and hearing, a court that enters an order confirming a plan of reorganization under chapter 11 may issue, in connection with such order, an injunction in accordance with this subsection to supplement the injunctive effect of a discharge under this section.
>
> (2)(B) The requirements of this subparagraph are that—
>
> > (i) the injunction is to be implemented in connection with a trust that, pursuant to the plan of reorganization—
> >
> > > (I) is to assume the liabilities of a debtor which at the time of entry of the order for relief has been named as a defendant in personal injury, wrongful death, or property-damage actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products

11 U.S.C. § 524(g). "If . . . a [statutory] provision 'is clear and unambiguous, [courts] must simply apply it.'" *Denby-Peterson*, 941 F.3d at 124 (*quoting In re KB Toys Inc.*, 736 F.3d 247, 251 (3d Cir. 2013)).

The injunction is available to a party only when "that party is alleged to be liable for the conduct of, claims against, or demands on' the debtor and to the extent that such

liability arises by reason of one of the four relationships between the third party and the debtor." *In re Quigley Co., Inc.*, 676 F.3d 45, 58-59 (2d Cir. 2012) (cleaned up). Those four (4) categories of relationships, as prescribed in the statute, are as follows:

> (I) the third party's ownership of a financial interest in the debtor, a past or present affiliate of the debtor, or a predecessor in interest of the debtor;
> (II) the third party's involvement in the management of the debtor or a predecessor in interest of the debtor, or service as an officer, director or employee of the debtor or a related party;
> (III) the third party's provision of insurance to the debtor or a related party; or
> (IV) the third party's involvement in a transaction changing the corporate structure, or in a loan or other financial transaction affecting the financial condition, of the debtor or a related party, including but not limited to—
>
> > (aa) involvement in providing financing (debt or equity), or advice to an entity involved in such a transaction; or
> > (bb) acquiring or selling a financial interest in an entity as part of such a transaction.

11 U.S.C. § 524(g)(4)(A)(ii).

The scores of retailers and corporate affiliates that the Debtor seeks to protect do not fit into any of the above categories of third parties eligible for a channeling injunction under § 524(g). Moreover, J&J cannot be entitled to a channeling injunction of the direct tort claims (i.e., claims that were not filed against it "by reason of its" ownership interest in the Debtor) in any plan of reorganization under § 524(g). *See Quigley*, 676 F.3d at 61. The Third Circuit has flatly held that § 105(a) may not "be employed to extend a channeling injunction to non-debtors in an asbestos case where the requirements of § 524(g) are not otherwise met." *Combustion Eng'g*, 391 F.3d at 233–34, 236–37 ("As both

the plain language of the statute and its legislative history make clear, § 524(g) provides no specific authority to extend a channeling injunction to include third-party actions against non-debtors where the liability alleged is not derivative of the debtor.").

Quite simply, the Debtor is seeking preliminarily an injunction that it cannot obtain permanently under Chapter 11 generally or any of its subparts (§ 524(g), § 105(a)) specifically. It has no chance of success on the merits.

2. Judicial estoppel also bars this entire case, rendering likelihood of success zero.

"Judicial estoppel is a fact-specific, equitable doctrine, applied at courts' discretion." *In re Kane*, 628 F.3d 631, 638 (3rd Cir.2010). Judicial Estoppel "'recognize[s] the intrinsic ability of courts to dismiss an offending litigant's complaint without considering the merits of the underlying claims when such dismissal is necessary to prevent a litigant from playing fast and loose with the courts.'" *Id*. (*quoting Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. General Motors Corp.*, 337 F.3d 314, 319 (3rd Cir. 2003).

"'[T]he basic principle of judicial estoppel . . . is that absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory.'" *Id*. Identifying criteria for determining whether or not inconsistent litigation positions justify application of the doctrine, the Third Circuit concluded:

> First, the party to be estopped must have taken two positions that are *irreconcilably inconsistent*. Second, judicial estoppel is unwarranted unless the party *changed his or her position in bad* faith—i.e., with intent to play fast and loose with the court. Finally, a district court may not employ judicial estoppel unless it is tailored to address the harm identified and *no lesser sanction would adequately remedy the damage* done by the litigant's misconduct.

Kane, 628 F.3d at 638-639 (*quoting Krystal Cadillac*, 337 F.3d at 319–20). *Accord Montrose Medical Group Participating Savings Plan v. Bulger*, 243 F.3d 773, 779–80 (3rd Cir.2001).

Here, LTL and its affiliates gained tremendous advantage in *LTL1* when they won a nationwide injunction barring tort plaintiffs from seeking justice in courts of general jurisdiction. LTL's position there—that LTL was fully backstopped and can fully pay all tort plaintiffs—is inconsistent with its apparent position now (that it faces financial distress because the new funding agreement is not as expansive as the last). But as discussed above, any inconsistencies between the first and second funding agreement are, on their face, the result of a fraudulent transfer, making LTL's waffling a bad faith effort to play "fast and loose" with the power of this Court. Even if none of the other (obviously dispositive) bars to this Chapter 11 case were absent, the equitable doctrine of judicial estoppel warrants dismissal of the entire action, rendering the likelihood of eventual success on the merits zero.

3. Only speculation supports Debtor's assertions of irreparable harm.

The Debtor fails to demonstrate by clear and convincing evidence that products liability claims against any (let alone, all) of the scores of Protected Parties will cause it irreparable harm.

The Debtor's reliance on conjectural obligations to indemnify fails. For all the reasons set forth above in the context of § 362(a), even if the unilateral allocation of Old JJCI's indemnification obligations to the Debtor on the eve of the bankruptcy filing passed muster (which it does not), the Debtor has not proven the existence of any "absolute" indemnification obligations that Old JJCI had to the alleged Protected Parties. (*See* Section B, supra. Even if the claimed indemnification obligations did exist, they are conditional and/or would require intervening lawsuits to enforce, making them much too speculative to support a finding of irreparable harm.

In all events, LTL's claimed indemnity obligations would not cause continued litigation against the so-called "Protected Parties" to undermine the reorganization process. Even if the Debtor's factual assertions are taken at face value, the Debtor has still not demonstrated that the effect of the indemnity agreements would be anything other than to replace talcum powder claimants with indemnity claims. *See Algemene Bank Nederland, N.V. v. Hallwood Indus., Inc.*, 133 B.R. at 180 ("If anything, allowance of judgment against Hallwood now might assist RAC's reorganization by replacing the

claims of Algemene, a clearly hostile creditor, with Hallwood's claim for indemnification.").

More importantly, as the Third Circuit recognized, any harm to LTL is offset by the existence of the funding agreements. A Debtor that "loses" money defending its tort liability, yet has the right to recapture those losses through a contract that acts "not unlike an ATM," cannot be said to face irreparable harm.

4. Grave harm to Respondents: victims of J&J Baby Powder were doubly victimized by LTL's 2021 bad faith bankruptcy, which wrongly barred their day in court. An injunction would make it extremely likely that Respondents here will die before LTL's second bad faith bankruptcy ends.

The Debtor has not shown that the balance of equities weighs in favor of an injunction. Nor can it. As the Fourth Circuit has observed, [o]f particular significance in balancing the competing interests of the parties . . . are the human aspects of the needs of a plaintiff in declining health as opposed to the practical problems imposed by the proceedings in bankruptcy, which very well could be pending for a long period of time. A stay under such circumstances would work manifest injustice to the claimant. *Williford v. Armstrong World Indus.*, 715 F.2d at 127–28.

Here, a manifest injustice is precisely what the Debtor is seeking to achieve through its request for injunctive relief. Indeed, the contrast between the negligible (if any) harm to the Debtor's estate, claimed by the Debtor to be backstopped by one of the

richest companies in the world, and the immense harm to dying victims whom J&J has allegedly poisoned is staggering.

Many of these victims will die before they can see justice done. Respondents here, who already had to postpone their lawsuits because of this Court's clearly erroneous factual findings and abuse of discretion in *LTL1*, will potentially forfeit claims for pain and suffering damages under the laws of many States should the Court make the same mistake twice. Victims are dying while the Debtor suffers no irreparable harm. Granting an injunction, in these circumstances, would wreak a grave injustice.

5. Overwhelming public interest: federalism, the separation of powers, abuse of the bankruptcy system, and the Seventh Amendment are at stake.

Finally, the Debtor has not shown that any public interest will be served by granting the extraordinary injunction of enjoining tens of thousands of personal injury lawsuits against non-bankrupt companies who, until recently, were content to defend themselves in court. Considering whether an injunction serves the public interest "requires a balancing of the public interest in successful bankruptcy reorganizations with other competing societal interests." *Monroe Well Serv.*, 67 B.R. at 753. The only benefit advanced by an injunction here would flow to one group of private corporate affiliates:

halting all litigation against J&J, its bankruptcy-ready cat's paw,[17] and scores of non-debtors.

In contrast, the *public*'s interest against an injunction is weighty. At stake are the interests of federalism, the separation of powers, the Seventh Amendment, and an open invitation for tortfeasors to open the floodgates to misuse the bankruptcy system.

Federalism is at stake because an injunction here would permit the discretion of a single Article I court to supplant the collective wisdom (or foolishness—it is beyond this Court's power to decide either way) of the States. Bankruptcy courts can sometimes extend their equitable powers that broadly, but *not* in service of a bad faith debtor. *See LTL1*, *SGL Carbon*, *etc.*

Separation of powers interests and the Seventh Amendment are both threatened by an injunction under these circumstances. This Court was not given the kind of broad jurisdiction that Article III courts enjoy when they apply state law in § 1332 diversity cases. Rather, it is an artificial, carefully hemmed outgrowth of Article I power. Permitting a bankruptcy court's power to supplant Article III jurisdiction must be permitted only in the narrowest circumstances. And those circumstances cannot include

[17] The term cat's paw derives from a fable conceived by Aesop, put into verse by Lo Fontaine in 1679, and injected into American case law in 1990. *Staub v. Proctor Hosp.*, 562 U.S. 411, 415 n.1 (2011). In the fable, a monkey induces a cat to extract roasting chestnuts from the fire. After the cat has done so, burning its paws in the process, the monkey makes off with the chestnuts and leaves the cat with nothing. *Id.* "A coda to the fable … observes that the cat is similar to princes who, flattered by the king, perform services on the king's behalf and receive no reward." *Id.*

cases where an alleged corporate poisoner creates a fictional, bankruptcy-ready cat's paw solely to escape from Article III (and state) courts into a single bankruptcy forum.

Article III "provides for the establishment of a court system as one of the separate but coordinate branches of the National Government." *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 15 (1955). In 2015, the Supreme Court wrote "[in *Northern Pipeline*] and more recently in *Stern*, this Court held that Congress violated Article III by authorizing bankruptcy judges to decide certain claims for which litigants are constitutionally entitled to an Article III adjudication." *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 669 (2015).

As to the Seventh Amendment, the civil jury system is ***the*** legal system in this country. It is not optional. When a United States citizen is harmed by a corporation, the civil jury system provides the remedy. The Seventh Amendment states:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

State legislatures, courts and constitutions "guarantee" and provide as "inviolate" the right of an injured person to have a jury trial.[18] Forty-nine states guarantee the right

[18] *See* for example, the constitutions of New York and New Jersey, which both specifically enshrine the right to a trial by jury, N.J. Const. art. I, § 9 ("The right of trial by jury shall remain inviolate."); N.Y. Const. Art. 1, § 2 ("Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever . . . ."), and both states make that right applicable to actions for money damages, N.Y. C.P.L.R. § 4101(1) (providing for jury trial of factual questions in actions for money damages).

to a jury trial in all civil or common-law cases within their state constitutions.[19]

The Seventh Amendment cannot abide the sort of injunctive relief contemplated here. A bankruptcy court cannot strip the right to trial from an asbestos-cancer victim. *See* 28 U.S.C. § 157(b) and 11 U.S.C. § 1129 (A)(7)(a)(ii).[20] *See also Billing v. Ravin, Greenberg & Zackin, P.A.*, 22 F.3d 1242, 1245 (3d Cir. 1994); *In Re G-I Holdings, Inc.*, 323 B.R. 583, 605–07 (Bankr. D. N.J. 2005) (holding that "claims held by the asbestos claimants are 'legal in nature,' and thus, they carry 'with it the Seventh Amendment's guarantee of a jury trial'" including for purposes of "liquidating their respective claims against [the debtor's] bankruptcy estate.") (quoting *Granfinanciera*, 492 U.S. at 55).[21] This bad faith bankruptcy also unduly burdens cancer victims' right to due process under the 14th Amendment: "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982).[22]

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[19] *See* Steven Gow Calabresi, et al., *Individual Rights Under State Constitutions in 2018: What Rights Are Deeply Rooted in a Modern-Day Consensus of the States*, 94 Notre Dame L. Rev. 49, 113-14 (Nov. 2018).

[20] Johnson & Johnson and the other Protected Parties are not the Debtor. In a liquidation of the Debtor they would simply have unsecured claims against the Debtor, they could not be granted any injunctive or other relief. Nor would a liquidation of the Debtor allow any channeling of future claims into a mandatory settlement trust, let alone future claims against the non-debtors Johnson & Johnson and the retailers.

[21] As one respected commentator put it: Congress "lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury" by assigning them to a bankruptcy court. *Granfinanciera*, 492 U.S. at 51-52. "[L]egal claims are not magically converted into equitable issues by their presentation to a court of equity," *Ross v. Bernhard*, 396 U.S. 531, 538 (1970), "nor can Congress conjure away the Seventh Amendment by mandating that traditional legal claims be brought there or taken to an administrative tribunal." *Granfinanciera*, 492 U.S. at 53-55 (holding that fraudulent conveyance action was a "private right" that was "not closely intertwined with a federal regulatory program" and had to be decided "by an Article III court"). *See* Dean Chemerinsky Brief, No. 32-30589-MBK, Dkt. 1323-4.

[22] A "protected property interest includes 'the ability to pursue an asbestos claim.'" *In re Energy Future Holdings Corp*, 949 F.3d 806, 822 (3d Cir. 2020) (citing *In re Grossman's Inc.*, 607 F.3d 114, 127 (3d Cir. 2010).

The tension between the Seventh Amendment and Chapter 11 may only be resolved by Congress (or by constitutional amendment). Section 524(g) only applies to (1) financially distressed debtors, (2) overwhelmed by asbestos liabilities, that (3) subject their assets and operations to the jurisdiction of the bankruptcy court. Recent decisions from the Fourth Circuit and Third Circuit reaffirm that non-distressed debtors are not allowed in bankruptcy court. In *In re Kaiser Gypsum*, the Fourth Circuit approvingly cited *In re Quigley Co.*, 676 F.3d 45, 58–59 (2d Cir. 2012), *In re W.R. Grace & Co.*, 13 F.4th 279, 283 (3d Cir. 2021), and legislative history in explaining that § 524(g) is meant to allow a "Chapter 11 debtor with substantial asbestos liabilities" to "emerge from bankruptcy as an economically viable entity." *In re Kaiser Gypsum Co., Inc.*, 60 F.4th 73, 77–78 (4th Cir. 2023).

The entire purpose of 524(g) is premised upon the company with shareholders, employees, and lenders, the one investors care about, the one that made and sold the asbestos products, being the ***same*** company that ***must*** file for Chapter 11[23] to have any chance to qualify for a permanent channeling injunction.[24]

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[23] Mr. President, this statutory affirmation of the court's existing injunctive authority is designed to help asbestos victims receive maximum value. It does so by assuring investors, lenders, and employees that the reorganized debtor has indeed emerged from Chapter 11 free and clear of all asbestos-related liabilities other than those defined in the confirmed plan of reorganization. . . .*See* 140 Cong. Rec. 28,358 (1994) (emphasis added).

[24] Senator Bob Graham said at the passage of 524(g): "this legislation provides companies who are seeking to fairly address the burden of thousands of current asbestos injury claims and unknown future claims, and who are willing to submit to the jurisdiction of the U.S. Bankruptcy Courts . . . a method to pay their current asbestos claims and provide for equitable treatment of future asbestos claims." 140 Cong. Rec.

The Debtor's tortured reading of 11 U.S.C. § 524(g) stands in stark contrast to the history of asbestos litigation. Johns-Manville filed for protection in 1982. The Texas statute at issue here was passed in 1989. Section 524(g) added to the Code in 1994 and modeled after what was accomplished in *Manville*. The Supreme Court of the United States struck down asbestos class action settlements—for infringing on *future* plaintiffs' Seventh Amendment Rights, among other reasons—in 1997 and 1999.[25] The Supreme Court did not read 524(g) as applying to non-debtors like Fibreboard (then) and would not apply it to LTL Management, "New" Johnson & Johnson Consumer, or Johnson & Johnson now.

During the early 2000s, at the Supreme Court's invitation, Congress debated several bills to address asbestos litigation.[26] Congress chose to pass none of them. Many

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8,021 (1994) (emphasis added). As further observed by Senator Heflin:

> For companies forced to file bankruptcy any plan of reorganization must contain a mechanism to address equitably the debtor's liability to all creditors, including mass tort claims – both those whose injuries are manifest and those who, although already exposed, will not manifest any [injury] until sometime in the future. Without that mechanism, liquidation may be inevitable and little or nothing would be left to compensate future claimants. *Id.*

[25] *Amchem Prods. v. Windsor*, 521 U.S. 591, 628-29 (1997) ("The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution.") and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845-46 (1999) (recognizing the "serious constitutional concerns that come with any attempt to aggregate individual tort claims on a limited fund rationale" as "a mandatory settlement-only class action with legal issues and future claimants compromises their Seventh Amendment rights without their consent.").

[26] The Fairness in Asbestos Injury Resolution Act of 2005 (S. 852, 109th Cong.); The Fairness in Asbestos Compensation Act of 1999 (S. 758, 106th Cong.), the Asbestos Compensation Act of 2000 (H.R. 1283, 106th Cong.), and the Asbestos Claims Criteria and Compensation Act of 2003 (S. 413, 108th Cong.).

of the legally baseless policy arguments advanced by Two Step debtors were made in Congress and failed. During this entire time several companies filed real asbestos bankruptcies because they apparently read all these developments the same way that MRHFM's plaintiffs read them now.[27]

The Supreme Court decided both *Amchem*[28]and *Ortiz*[29] ***after*** 524(g) was added to the bankruptcy code. What both rulings in these seminal asbestos cases make clear is that 524(g) is ***not*** an option for non-distressed non-debtors (like J&J) to use instead of litigating in the jury system and, just because there were a lot of asbestos cases at the time of *Amchem* and *Ortiz*, each asbestos victim is still guaranteed her right to a jury trial with uncapped damages under applicable state law. Section 524(g) does ***not*** provide solvent companies like J&J that have asbestos liabilities with any authority to "overcome the tort system" even if they have filed for bankruptcy, and especially when they have ***not*** filed for bankruptcy.

In *Ortiz*, a group of plaintiffs' lawyers, in conjunction with Fibreboard and its insurer, attempted to negotiate a resolution of all asbestos-related claims against Fibreboard. *Ortiz*, 527 U.S. at 823-24. To resolve potential future claims, the parties sought

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[27]By way of example, *see In re WR Grace & Co.*, 729 F.3d 332 (3d Cir. 2013); *In re Armstrong World Indus., Inc.*, 348 B.R. 136 (D. Del. 2006); *In re USG Corp.,* 290 B.R. 223 (Bankr. D. Del. 2003); *In re Fed.-Mogul Glob. Inc.,* 684 F.3d 355 (3d Cir. 2012); *In re Celotex Corp.,* 204 B.R. 586 (Bankr. M.D. Fla. 1996); *In re Nat'l Gypsum Co.*, 257 B.R. 184 (Bankr. N.D. Tex. 2000).

[28] *Amchem Prods. v. Windsor*, 521 U.S. 591 (1997).

[29] *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

approval for a mandatory settlement class action with no opt-out provision. *Id.* at 823-26. The upshot of this agreement would have been to channel the future claims to an administrative settlement fund that had limited opt-out rights. *Id.* at 827. The Supreme Court flatly rejected this attempt. *Ortiz*, 527 U.S. at 848.

The Court recognized the significant Seventh Amendment implications of the proposed mandatory settlement class and that the limited "opt-out" rights provided in the plan failed to cure this flaw because they failed to provide an opportunity for "withdrawal of class members whose jury trial rights will be compromised, whose damages will be ***capped***, and whose payments will be delayed." *Ortiz*, 527 U.S. at 847 fn. 23, 860. Juries not only decide winners and losers; juries decide how much a plaintiff's claim is worth and what damages should and should not be awarded.[30]

The Supreme Court commented on 524(g) in *Ortiz*, noting its enactment "enable[d] a ***debtor*** in a Chapter 11 reorganization in certain circumstances to establish a trust to which the ***debtor*** may channel future asbestos related liability." *Id.* at 859-60, fn. 34 (emphasis added). In a concurring opinion, Justice Rehnquist meaningfully noted:

> Under the present regime, transactional costs will surely consume more and more of a relatively static amount of money to pay these claims. But

[30] The Supreme Court dismissed the "fund" in *Ortiz* as "limited" because it was only "limited" by agreement of the parties; there, Fibreboard had $235 million in assets, $2 billion in insurance, and 45,000 outstanding asbestos cases. The Court found especially offensive to the rule of law the fact that the settlement, allegedly relying on "limited" resources, permitted Fibreboard to keep nearly all its net worth for itself. *Ortiz*, 527 U.S. at 860. This is ***precisely*** what J&J proposes to do in this case through the Texas Two Step.

> ***we are not free*** to ***devise an ideal system*** for adjudicating these claims. Unless and until the Federal Rules of Civil Procedure are revised, the Court's opinion correctly states the existing law, and I join it. But the 'elephantine mass of asbestos cases,' [citation omitted], cries out for a legislative solution.

Id. at 865 (emphasis). The Supreme Court did not view 524(g)—situated within Chapter 11 of the Bankruptcy Code—as a means to resolve large groups of asbestos cases *unless* an asbestos company overwhelmed by asbestos liabilities filed for bankruptcy under Chapter 11, a real bankruptcy; not a Texas Two Step.

Tellingly, the Third Circuit recognized that both *Amchem* and *Ortiz* failed as class action devices to resolve claims of "present and future" asbestos victims because in both cases the "interests of absent class members" were not adequately protected. *Fed-Mogul,* 648 F.3d at 358-59. After discussing the history of asbestos litigation and legislative inaction, the Circuit wrote what Johnson & Johnson should take to heart: "we leave such systematic public policy questions to Congress." *Id.* at 362.

There is no logical stopping point to the Debtor's strategy of putting the cart (a § 524(g) channeling injunction) before the horse (Chapter 11's express purpose of allowing a financially distressed company the breathing room to reorganize). Any rich company facing liabilities could stymie them simply by allocating them to a new entity and putting the entity into bankruptcy. The bankruptcy courts would be burdened with abusive petitions, courts of general jurisdiction would face roiling, uncertain dockets, and public confidence in the fair administration of the bankruptcy system would be

undermined. If permitted to succeed, the Debtor's strategy would undermine the multi-district litigation system that Congress established in 28 U.S.C. § 1407 to centralize, efficiently manage and ultimately settle mass tort actions and other litigations alleging the same claims and injuries. The charade that the Debtor seeks to perpetrate in New Jersey is not in the public interest.

What the Debtor seeks to deprive the claimants of is their fundamental right to a jury trial of their claims enshrined in the Seventh Amendment of the United States Constitution. *See, e.g., Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 59–61 (1989) ("Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity.").

Debtor cannot carry its burden on even one of the four *Winter* factors. Any grant of injunctive relief to non-debtors would substitute power this Court *doesn't have* for the *entire* American civil justice system. That may be (for selfish reasons) what Johnson & Johnson wants, and it may be (for noble, settlement promoting reasons) what this Court desires. But under the controlling test, it would be a gross abuse of this Court's discretion.

III. CONCLUSION

When invoked properly, this Court's jurisdiction provides "powerful equitable weapons" to protect both creditors and good faith debtors. *In re Forever Green Athletic Fields, Inc.*, 804 F.3d 328, 334 (3d Cir. 2015) (quoting *In re Little Creek Dev. Co.*, 779 F.2d

1068, 1072 (5th Cir. 1986)). But those weapons are strictly limited by statute, *Law v. Siegel*, 571 U.S. 415, 421 (2014), and cannot be wielded when a petition has not been brought in good faith, *see SGL Carbon*, 200 F.3d at 161.

This Court, under the circumstances here, lacks jurisdiction to allow this case to proceed, lacks jurisdiction to enter the equitable relief sought by Debtor, and would severely abuse its discretion under the preliminary injunction standard if it granted the relief Debtor (and its protection-seeking but non-bankrupt corporate overlord) seeks. Debtor's motion to extend the stay (or, alternatively, for a preliminary injunction) must be DENIED.

Respectfully submitted:

MAUNE RAICHLE HARTLEY
FRENCH & MUDD, LLC

/s/ Suzanne M. Ratcliffe

_____

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FRENCH & MUDD, LLC
150 W. 30th Street, Suite 201
New York, NY 10001
(800) 358-5922
sratcliffe@mrhmflaw.com

EXHIBIT 1

CASE: Jackson, Mary DOCKET: L-6217-20 DATE: 9/30/21 FIRM: Levy / Maune

DISCOVERY CMO IV

_____ 2021 Plaintiff shall serve answers to standard interrogatories by this date.

_____ 2021 Defendants shall serve answers to standard interrogatories by this date.

_____ 2021 Plaintiff shall propound supplemental discovery by this date.

_____ 2021 Defendants shall serve answers to supplemental discovery by this date.

_____ 2021 Defendants shall propound supplemental discovery by this date.

_____ 2021 Plaintiff shall serve answers to supplemental discovery by this date.

_____ 2021 Plaintiff depositions shall be conducted by this date.

11/15 2021 Fact discovery shall be completed by this date.

_____ 2021 Depositions of corporate representatives shall be completed by this date.

FILED
SEP 30 2021
ANA C VISCOMI J.S.C

EARLY SETTLEMENT

12/15 2021 Settlement demands shall be served on all counsel and the Special Master by this date.

MEDICAL EXPERT REPORT

_____ 2021 Plaintiff shall serve executed medical authorizations by this date.

11/30 2021 Plaintiff shall serve medical expert reports and transfer pathology by this date.

1/28 2022 ~~2021~~ Defendants shall serve medical reports by this date.

LIABILITY and ECONOMIST EXPERT REPORTS

11/30 2021 Plaintiff shall serve liability and economist expert reports by this date.

1/28 2022 ~~2021~~ Defendants shall serve liability and economist expert reports by this date.

SUMMARY JUDGMENT MOTION PRACTICE

2/4 2022 ~~2021~~ Summary judgment filing deadline. Return date: 3/4 2022 ~~2021~~

EXPERT DEPOSITIONS

4/1 2022 ~~2021~~ Expert depositions shall be completed by this date.

PRE-TRIAL AND TRIAL

TBS 2021 @_____ Settlement conference. Trial date: 4/28 2022 ~~2021~~

IT IS hereby **ORDERED** on this date.

/s/ Ana C. Viscomi
ANA C. VISCOMI, J.S.C.

CASE: Meikle, Elizabeth DOCKET: [illegible] DATE: 4/23/21 FIRM: Levy/Maune

DISCOVERY CMO 111

_____ 2021 Plaintiff shall serve answers to standard interrogatories by this date.

_____ 2021 Defendants shall serve answers to standard interrogatories by this date.

_____ 2021 Plaintiff shall propound supplemental discovery by this date.

_____ 2021 Defendants shall serve answers to supplemental discovery by this date.

_____ 2021 Defendants shall propound supplemental discovery by this date.

_____ 2021 Plaintiff shall serve answers to supplemental discovery by this date.

_____ 2021 Plaintiff depositions shall be conducted by this date.

7/30 2021 Fact discovery shall be completed by this date.

_____ 2021 Depositions of corporate representatives shall be completed by this date.

FILED
APR 23
ANA C. VISCOMI, J.S.C

EARLY SETTLEMENT

8/31 2021 Settlement demands shall be served on all counsel and the Special Master by this date.

MEDICAL EXPERT REPORT

_____ 2021 Plaintiff shall serve executed medical authorizations by this date.

8/31 2021 Plaintiff shall serve medical expert reports and transfer pathology by this date.

10/29 2021 Defendants shall serve medical reports by this date.

LIABILITY and ECONOMIST EXPERT REPORTS

8/31 2021 Plaintiff shall serve liability and economist expert reports by this date.

10/29 2021 Defendants shall serve liability and economist expert reports by this date.

SUMMARY JUDGMENT MOTION PRACTICE

11/5 2021 Summary judgment filing deadline. Return date: 12/3 2021

EXPERT DEPOSITIONS

12/31 2021 Expert depositions shall be completed by this date.

PRE-TRIAL AND TRIAL

TBS 2021 @_____ Settlement conference. Trial date: 1/30 ~~2021~~ 2022

IT IS hereby **ORDERED** on this date.

/s/ Ana C. Viscomi
ANA C. VISCOMI, J.S.C.

CASE: Weathers, Sandra DOCKET: L-549-20 DATE: 7/2/21 FIRM: Levy/Maure

CMO V1

DISCOVERY

_____ 2021 Plaintiff shall serve answers to standard interrogatories by this date.

_____ 2021 Defendants shall serve answers to standard interrogatories by this date.

_____ 2021 Plaintiff shall propound supplemental discovery by this date.

_____ 2021 Defendants shall serve answers to supplemental discovery by this date.

FILED
JUL 0 2 2021
ANA C. VISCOMI, J.S.C.

_____ 2021 Defendants shall propound supplemental discovery by this date.

_____ 2021 Plaintiff shall serve answers to supplemental discovery by this date.

_____ 2021 Plaintiff depositions shall be conducted by this date.

8/13 2021 Fact discovery shall be completed by this date.

_____ 2021 Depositions of corporate representatives shall be completed by this date.

EARLY SETTLEMENT

12/15 2021 Settlement demands shall be served on all counsel and the Special Master by this date.

MEDICAL EXPERT REPORT

_____ 2021 Plaintiff shall serve executed medical authorizations by this date.

8/31 2021 Plaintiff shall serve medical expert reports and transfer pathology by this date.

10/29 2021 Defendants shall serve medical reports by this date.

LIABILITY and ECONOMIST EXPERT REPORTS

8/31 2021 Plaintiff shall serve liability and economist expert reports by this date.

10/29 2021 Defendants shall serve liability and economist expert reports by this date.

SUMMARY JUDGMENT MOTION PRACTICE

11/5 2021 Summary judgment filing deadline. Return date: 12/3 2021

EXPERT DEPOSITIONS

1/7 ~~2021~~ 2022 Expert depositions shall be completed by this date.

PRE-TRIAL AND TRIAL

TBS 2021 @_____ Settlement conference. Trial date: 1/31 ~~2021~~ 2022

IT IS hereby **ORDERED** on this date.

/s/ Ana C. Viscomi
ANA C. VISCOMI, J.S.C.

CASE: Zachara, Marzena DOCKET: L-1028-21 DATE: 5/25/21 FIRM: Levy

CMO 1

DISCOVERY

_____ 2021 Plaintiff shall serve answers to standard interrogatories by this date.

_____ 2021 Defendants shall serve answers to standard interrogatories by this date.

6/11 2021 Plaintiff shall propound supplemental discovery by this date.

7/16 2021 Defendants shall serve answers to supplemental discovery by this date.

6/11 2021 Defendants shall propound supplemental discovery by this date.

7/16 2021 Plaintiff shall serve answers to supplemental discovery by this date.

_____ 2021 Plaintiff depositions shall be conducted by this date.

8/31 2021 Fact discovery shall be completed by this date.

8/31 2021 Depositions of corporate representatives shall be completed by this date.

FILED
MAY 25 2021
ANA C. VISCOMI, J.S.C.

EARLY SETTLEMENT

1/3 ~~2021~~ 2022 Settlement demands shall be served on all counsel and the Special Master by this date.

MEDICAL EXPERT REPORT

_____ 2021 Plaintiff shall serve executed medical authorizations by this date.

10/29 2021 Plaintiff shall serve medical expert reports and transfer pathology by this date.

12/23 2021 Defendants shall serve medical reports by this date.

LIABILITY and ECONOMIST EXPERT REPORTS

10/29 2021 Plaintiff shall serve liability and economist expert reports by this date.

12/23 2021 Defendants shall serve liability and economist expert reports by this date.

SUMMARY JUDGMENT MOTION PRACTICE

1/7 ~~2021~~ 2022 Summary judgment filing deadline. Return date: 2/4 ~~2021~~ 2022

EXPERT DEPOSITIONS

2/28 ~~2021~~ 2022 Expert depositions shall be completed by this date.

PRE-TRIAL AND TRIAL

TBD 2021 @_____ Settlement conference. Trial date: 3/21 ~~2021~~ 2022

IT IS hereby **ORDERED** on this date.

/s/ Ana C. Viscomi
ANA C. VISCOMI, J.S.C.

EXHIBIT 2

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

IN RE:	Case No. 22-2003/22-2004
LTL MANAGEMENT LLC, Debtor, OFFICIAL COMMITTEE OF TALC CLAIMANTS, Appellant.	21400 U.S. Courthouse 601 Market Street Philadelphia, PA 19106 Monday, September 19, 2022
IN RE LTL MANAGEMENT LLC, Debtor. LTL MANAGEMENT, LLC. v. THOSE PARTIES LISTED ON APPENDIX A TO COMPLAINT AND JOHN AND JANE DOES 1-1000 OFFICIAL COMMITTEE OF TALC CLAIMANTS, Appellant.	Case No. 22-2005
IN RE: LTL MANAGEMENT LLC, Debtor. OFFICIAL COMMITTEE OF TALC CLAIMANTS, ET AL. Appellants.	Case No. 22-2006/22-2007
IN RE: LTL MANAGEMENT LLC, Debtor. LTL MANAGEMENT LLC v. THIRD PARTIES LISTED ON APPENDIX A TO COMPLAINT AND JOHN AND JANE DOES 1-1000, OFFICIAL COMMITTEE OF TALC CLAIMANTS, ET AL.	Case No. 22-2008

OFFICIAL COMMITTEE OF TALC CLAIMANTS, ET AL.
Appellants.

IN RE:
LTL MANAGEMENT LLC,
Debtor.
Case No. 22-2009

ARNOLD & ITKIN LLP, ON BEHALF OF CERTAIN PERSONAL INJURY CLAIMANTS REPRESENTED BY ARNOLD & ITKIN,
Appellant.

IN RE:
LTL MANAGEMENT LLC,
Debtor.
Case No. 22-2010

AYLSTOCK WITKIN KRIES & OVERHOLTZ PLLC, ON BEHALF OF MORE THAN THREE THOUSAND HOLDERS OF TALC CLAIMS,
Appellant.

IN RE:
LTL MANAGEMENT LLC,
Debtor.
Case No. 22-2011

LTL MANAGEMENT LLC

v.

THOSE PARTIES LISTED ON APPENDIX A TO COMPLAINT AND JOHN AND JANE DOES 1-1000

AYLSTOCK WITKIN KRIES & OVERHOLTZ, PLLC., ON BEHALF OF MORE THAN THREE THOUSAND HOLDERS OF TALC CLAIMS,
Appellant

TRANSCRIPT OF ORAL ARGUMENT
BEFORE
THE HONORABLE JUDGE THOMAS L. AMBRO
UNITED STATES THIRD CIRCUIT JUDGE
THE HONORABLE L. FELIPE RESTREPO
UNITED STATES THIRD CIRCUIT JUDGE
THE HONORABLE JULIO M. FUENTES
UNITED STATES THIRD CIRCUIT JUDGE

APPEARANCES:

For the Appellants:	MoloLamken By: JEFFREY A. LAMKEN, ESQ. 600 New Hampshire Avenue, N.W. Washington, D.C. 20037 Kellogg Hansen Todd Figel & Frederick BY: DAVID C. FREDERICK, ESQ. 1615 M Street, N.W., Suite 400 Washington, D.C. 20036
For U.S. Trustee:	U.S. Department of Justice By: SEAN JANDA, ESQ. Appellate Section Room 7260 950 Pennsylvania Avenue, N.W. Washington, D.C. 20530
For Appellees:	Hogan Lovells US By: NEAL K. KATYAL, ESQ. 555 Thirteenth Street, N.W. Washington, D.C. 20004

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I N D E X

THE COURT: Welcome this afternoon. We have In re LTL Management LLC, Numbers 22-2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, and 2011. And in connection with the oral arguments today, I had told counsel previously that we would probably go a bit longer than the two hours. That said, once upon a time, we had an oral argument we started in the morning in a case called Combustion Engineering and we went from about 9:30 until about 5:30, 5:45 and I didn't realize we didn't -- I was reminded years later that we only took two 15-minute breaks, which was not fair.

Seth Waxman argued and he told me that and somebody was with him at the time. Now, Judge Craig Goldblatt said that is exactly right. And I didn't realize that Mr. Waxman doesn't eat on the day of oral argument. And so in the afternoon, one of my law clerks was feeling a little faint and went and got some M&Ms, and she's sitting over there and she looks at Mr. Waxman and Mr. Waxman looks at her and they both go, open their hands and each had M&Ms in their hands. So I've learned my lesson.

What we will do is we will not go past five o'clock today and we will take a break after the first hour so that everybody can get some time to regroup. And also if somebody wishes to have a break sooner than that, just give me a little bit of a high sign and we'll go from there.

And with that, why don't we begin with Mr. Lamken.

And I've promised Mr. Lamken and Mr. -- come on up -- Mr. Katyal that similar to what the Supreme Court has been doing the last few years, will have two minutes of uninterrupted time at the beginning of your argument.

MR. LAMKEN: Thank you, Your Honor. May it please the Court. If I may reserve 15 minutes for rebuttal.

THE COURT: You certainly may.

MR. LAMKEN: For more than a century, companies facing genuine financial distress have done what companies like Johns-Manville did. They submit themselves and their assets to the bankruptcy court and to the Code's requirements and creditor protections. This is an effort to do the opposite. In LTL's words, to put talc-related claims through the Chapter 11 reorganization without subjecting the rest of the assets of JJCI to bankruptcy procedures and to enjoin suits against 670 non-debtors, including affiliates, even though they have independent non-derivative liability. That subverts at least four different core bankruptcy principles.

First, if J&J or JJCI had declared bankruptcy, priority rules would require creditors to be paid in full before equity gets anything. But here, J&J and JJCI operate outside bankruptcy with Old JJCI's assets, paying billions in dividends to equity, to shareholders. Last week, J&J announced a $5 billion stock buyback, more for equity. But talc victims alone are mired in bankruptcy as they die.

Old JJCI's trade creditors are compensated in the ordinary course, but the disfavored creditors, talc victims, sit languishing in bankruptcy. A clearer subversion of the priority rules that ordinarily apply is hard to imagine.

Second, debtors-in-possession management ordinarily have a powerful incentive to try and emerge from bankruptcy as quickly as possible so they can get on with their ordinary operations free from bankruptcy supervision. But here, J&J and JJCI, the tortfeasors funding all of this, have no such interest in swift emergence. They operate Old JJCI's assets outside of the Bankruptcy Code free and clear of bankruptcy court supervision, paying who they want while talc claimants alone are in bankruptcy.

LTL has no incentive. It exists only for bankruptcy, no operating business, no transactions to engage in. You need only look at the three other two step bankruptcies to understand exactly what happens to these incentives. Before bankruptcy, for example, Bestwall had resolved 15,000 asbestos claims. Now, five years in, not one claimant has received compensation from bankruptcy. We have no approved plan and all the official committee representatives alive at the case's outset have passed away. Worse, the delay benefits LTL and JJCI and Johnson and Johnson as talc victims can only get more desperate. They can only get more likely to cave each day they face unreimbursed medical expenses and they get closer to their

own deaths.

THE COURT: Is your principal argument that there is not a proper bankruptcy purpose or that the debtor here is not in financial distress or what?

MR. LAMKEN: So the answer is it's not a proper bankruptcy purpose because evading Bankruptcy Code principles is not a valid bankruptcy principle. As this Court pointed out in SGL, those who seek relief in bankruptcy have to comport with the underlying Bankruptcy Code principles. And when the bankruptcy is established for the very purpose of evading the ordinary bankruptcy procedures --

THE COURT: And by the ordinary Bankruptcy Code principles, you mean what?

MR. LAMKEN: I mean, for example, what I started out with, which is the priority rules. This is structured so that all the dividends, all the equity can be paid while one category of claimants, talc creditors, sit in bankruptcy and don't get paid. Another principle is that you have to have incentives to come to the bankruptcy to come forward with a reasonable plan in order to emerge swiftly. But the opposite is true when you take all the operating assets, all the businesses, and you can operate them outside bankruptcy and the only people who are mired in bankruptcy are the talc claimants.

THE COURT: Are you referring to economic relief for the victims?

MR. LAMKEN: Yes. Yeah, that's exactly right. And the ordinary principle is under the absolute priority rule, the ordinary rule is no equity gets paid until creditors are paid. And we have the exact opposite going on here.

THE COURT: How was that economic relief appropriated?

MR. LAMKEN: I'm sorry, Your Honor.

THE COURT: Is that economic relief delivered to the victims?

MR. LAMKEN: So in the ordinary tort system, the victims bring their lawsuits and they either settle or they go to trial and they get relief. But they're allowed to proceed and try and seek that compensation through the system that 50 states have used for two centuries to compensate victims of misconduct. But right now --

THE COURT: So you're saying bankruptcy does not allow that to happen?

MR. LAMKEN: Well, bankruptcy delays it while we're going through all the plans and trying to come up with it. And right now, if you look at how it works when you have these two-step bankruptcies, it goes for Bestwall, five years with nobody getting compensated, no plan, and everybody dying in the meantime. By contrast, if you don't separate it -- people have, if you don't separate your liabilities and put them off into one entity, an artificial entity with just these talc

liabilities and you instead have the people with liabilities and the actual companies in bankruptcy, then there's an incentive to go forward and come up with a plan so people actually get compensated and get compensated promptly because management wants to emerge from bankruptcy. But right now, there's no incentive actually to do that for J&J and JJCI because they're operating Old JJCI's assets, famous brands of, you know, Tylenol and the like, free and clear of bankruptcy's requirements.

Instead, the only ones who are sitting in bankruptcy are the talc claimants. They pay their ordinary trade creditors, no problem. Pay them as the money comes due. Only the talc claimants sit in bankruptcy. And it's just in that sense like SGL where you've just taken one set of creditors and put them at a disadvantage, talc victims, and everybody else proceeds as before.

THE COURT: If LTL were formed in 1979 to hold the talc products, so instead of it going to baby products, it goes to LTL and LTL operated for a number of years but now is in the process of doing, in effect, an orderly liquidation, would you have a problem?

MR. LAMKEN: So I think that the issue we have in terms of evading the structure of the Bankruptcy Code and all the principles of the Bankruptcy Code, that would be a very difficult argument to make because once you take an entity and

you operate it and you have a legitimate business purpose for the structure that the entity has and you're operating it for a number of years, then it has a legitimate non-bankruptcy purpose. Where you cross the line is, where two days before you declare bankruptcy, you do a divisive merger in order to put the talc claimants into bankruptcy alone and take the assets, the operating businesses, the valuable brands of that former company and put them outside bankruptcy, and it's solely for the purpose to ensure that talc claimants are treated one way and all the assets are outside the bankruptcy. When you do that two days before bankruptcy, I think that clearly crosses the line.

THE COURT: It sounds from what you're saying is, you're saying it would be a different argument. But it sounds like if they had done that in '79 and ran the company for a number of years, ultimately decided they couldn't go forward, do a liquidating 11, it would be an acceptable bankruptcy purpose in that particular circumstance. Is that correct?

MR. LAMKEN: So I would not be able to argue today that this is an evasion of bankruptcy purposes because clearly it was done for a purpose, not evading bankruptcy. It was done because that was a logical way to operate the business in 1979. It was operated --

THE COURT: So, and then you're saying at the other end of the spectrum, what they did by forming on October 12,

2021, filing two days later, it doesn't work. Where is the line that is crossed in your view?

MR. LAMKEN: So I think the line is when the sole purpose is not a legitimate business purpose of this is a logical way to operate the company, but the sole purpose is to disrupt, to subvert, to frankly, pervert the Bankruptcy Code, to evade its ordinary principles, I think that crosses the line. And here --

THE COURT: What do we make of the timing here? And what I mean by the timing is, is I understand that about four months after the Supreme Court denied cert in Ingham, LTL is formed and shortly thereafter, the day after -- they file for bankruptcy shortly thereafter. What do you make of the timing here?

MR. LAMKEN: So, Your Honor, I think the timing is clear that in essence, J&J had felt failed and they said this, "We felt failed by the tort system." And so they went to another system they thought would be more favorable. They went to bankruptcy. But the problem is, if they want to evade the tort system and move to bankruptcy, if they have financial distress, and I know that's disputed, and if they have a legitimate purposes, that's fine. But they also don't want to actually face the usual bankruptcy rules because rather than just taking, we have a distressed tortfeasor, JJCI or J&J, and we'll put it into bankruptcy, which is the ordinary way of

doing it. That's how it was done in Johns-Manville. That's how it's been done for 200 -- well, 100 years since we've had something like a Chapter 11.

Rather than do that, they did something fancy and they said we're going to take the talc claimants alone. They're going to go into bankruptcy by themselves and they're the only creditors that will be stuck in bankruptcy. The assets, these businesses that are producing valuable goods with famous names, those are going to stay outside bankruptcy and that subverts everything that bankruptcy supposed to do.

In fact, if I go to the third point is that, you know, the usual rule in bankruptcy is the bankruptcy court has supervision over the debtor's operations to make sure those operations are working for creditor benefit to enforce fiduciary duties towards the creditors. But if you look at Appendix Page 4463, J&J has now announced it's actually going to spinoff its consumer products division, effectively spinning off JJCI.

Now, if J&J or JJCI had declared bankruptcy, the bankruptcy court, under Section 363, would have authority over that non-ordinary course. Creditors like the talc claimants would then be able to have notice and an opportunity to be heard. But because they've shifted everything to a new entity and they've only put an artificial entity, a concocted made-for-bankruptcy entity into bankruptcy, none of those

protections apply. There's no ability for the bankruptcy court to look and say, yes, you're spinning off JJCI. Let's make sure that we put everything in escrow. Let's make sure we do something to make sure that all those funds are available for the creditors for whom they should benefit.

THE COURT: Your concern is principally for the talc victims. Is that --

MR. LAMKEN: Absolutely, Your Honor.

THE COURT: And your suggestion, if I'm not mistaken, is to take them out of bankruptcy. Is that --

MR. LAMKEN: Pardon me?

THE COURT: To take those talc victims out of bankruptcy. They should not be subject to the --

MR. LAMKEN: That's right.

THE COURT: -- bankruptcy requirements?

MR. LAMKEN: Because this is not a good faith bankruptcy, because the purpose of the bankruptcy by its terms is to evade the usual bankruptcy requirements, the bankruptcy should be dismissed.

Now, there's a second question --

THE COURT: So it's a bankruptcy to avoid bankruptcy?

MR. LAMKEN: Pardon?

THE COURT: It's a bankruptcy to avoid bankruptcy. Is that what you're saying?

MR. LAMKEN: This is exactly what it is. It's a

bankruptcy designed to avoid the purposes and principles of bankruptcy. It's been gerrymandered in a sense so as to place only one class of creditors at risk.

THE COURT: You were mentioning the second question, but let me ask you. If we come to the conclusion this was not done in good faith, this is a bad faith filing, do we need to get to the second question on the stay?

MR. LAMKEN: No, Your Honor, because the mandatory requirement under 1112(b) is if it's not, if there is cause, the Court must dismiss. It says it shall dismiss. So if this is not good faith, the standard and only remedy is dismissal.

Now, there is an unusual circumstances exception, but there's requirements that have not been met. One of them is that there was good cause or good justification. And there's simply no good justification for a bad faith bankruptcy. And second is that there has to be a cure in a reasonable period of time. And I think when the entire bankruptcy is structured so that talc victims are on their own in bankruptcy and all the other creditors are outside bankruptcy, when the structure is set up so that talc victims are in bankruptcy but all the assets are outside bankruptcy, there's no cure there that some would come up with and I don't think the bankruptcy court ever suggested there could be a cure.

THE COURT: If you were in the shoes and you call it Old JJCI, I'd probably just call for the sake of people here in

the audience, Old Consumer. So you have Johnson and Johnson, Johnson and Johnson Consumer which took over baby products. So Consumer doesn't go in, it keeps the other items like, you know, Aveno, Tylenol, et cetera, and you separate out -- it's like good bank, bad bank back in the late '80s when you had -- come in on a Friday night and you separate everything out and you open the bank up on Monday.

In light of the verdict in the Ingham case, which I think surprised a lot of people, even though it was ultimately reduced, what would you have advised to do if you were representing J&J Consumer?

MR. LAMKEN: So I think my answer would be the answer that all the companies have confronted for a long time, which is if you're genuinely in financial distress, you can take your company into bankruptcy. If you're not genuinely in bankruptcy, excuse me, in financial distress, then you may continue your fight. Yes, you got a bad result in Ingham, but look, after Ingham, what did J&J tell its investors. After it was denied, it said the facts were "unique and the case is not representative." That's at Appendix 4 -- excuse me 4404.

After the denial in Ingham, what did they tell the investors, that liabilities were "not expected to have a material adverse effect on the company's financial position." Appendix 4506. And what did it tell the Court about -- what did LTL tell the Court? It reiterated that there was in light

of the liabilities, "no likely need of the debtor to invoke the funding agreement," so that's supposedly $61 billion to its maximum amount or anything close to it." That's at Appendix 3747.

This is probably the first planned major bankruptcy, at least the first I've ever heard of, where if you're looking for indicia of financial distress, you don't find any business executive, you don't find any documents at J&J or JJCI before the bankruptcy saying, "Wow, we're financially distressed. We're heading for insolvency." The first time you see that is in the bankruptcy and where is it coming from? It's coming from the lawyers.

THE COURT: When you look at financial distress, are you looking at Old Consumer and LTL or just LTL?

MR. LAMKEN: So I think that the proper answer since we're -- if we indulge the facade that LTL as a legitimate entity to put into bankruptcy, and mind you --

THE COURT: You'll have to raise your voice just a tad when you --

MR. LAMKEN: Pardon?

THE COURT: Raise your voice just the tad, sir.

MR. LAMKEN: Yes.

So if we indulge the notion, one that I wouldn't accept, that it's okay to take LTL and put LTL into bankruptcy, I think the answer is you have to look at LTL's liabilities

because that's the chosen one, the one they've chosen, and you would ask, can LTL -- is it suffering financial distress?

This case is live by the LTL, die by the LTL. They've chosen to designate something LTL, claim it's a separate entity, push it into bankruptcy with just the talc victim claimants. Well, then you're looking for financial distress, you're going to just look at LTL.

THE COURT: But I thought your initial concern was the optics aren't right in breaking off and keeping out of bankruptcy Good Company, while putting into bankruptcy Bad Company with the liabilities.

MR. LAMKEN: That's exactly right, Your Honor. And that's why if you're going to indulge the notion, but that's the key thing.

THE COURT: Doesn't that sound as if you're taking Old Consumer into account? It's almost like, I kept wondering why somebody didn't file like a fraudulent conveyance action.

MR. LAMKEN: So, Your Honor, you know, down the road, if we're legitimately in bankruptcy, there are remedies for certain individual transgressions. But the fact that there are remedies down the road for individual transgressions doesn't make an otherwise bad faith bankruptcy a good faith bankruptcy to begin with. Good faith is a threshold requirement at the outset.

When the entire structure of your bankruptcy is

designed to evade traditional bankruptcy requirements, traditional priority rules, supervision over spinoffs, all the things that courts do to make sure that the money is there for creditors. When it's designed to do that, well, it's just not a good faith bankruptcy. You don't even get to something like a fraudulent conveyance.

THE COURT: Let me go back to financial distress and litigation for a minute. Opposing counsel makes much of the fact that there are 38,000 plus claims being filed, or have been filed and more coming with respect to the talc litigation, can fear or the cost of this litigation qualify as financial distress?

MR. LAMKEN: So, Your Honor, I don't think the supposed efficiency of bankruptcy counts. I think the Court has said that in cases like SGL, that that isn't, thinking that you're going to be more efficient in bankruptcy, doesn't count. But even so, that still doesn't tell you whether or not it's --

THE COURT: Not so much more efficient, but less exposure. Or is the exposure the same?

MR. LAMKEN: Yeah. So I think, Your Honor, the notion that if one is going to be in financial distress, that is the threshold. You need immediate financial distress. The notion that you can just reduce your liabilities from yay to lower isn't a sufficient basis. And so the real question is, looking at LTL, or if you want to indulge fiction and go back

to JJCI as the bankruptcy court did, was there legitimate financial distress that they were not going to be able to make their payments, that they really had a need to go into bankruptcy, which is powerful medicine. People don't get paid. Forty thousand cases around the country get stayed. That's powerful medicine. You have to have some significant showing there, and we don't think they got there.

But even apart from it, if there is financial distress, that just reinforces my first point which is, if there's financial distress, that's all the more reason you want the traditional bankruptcy protections to be in place. If there's financial distress, you don't want money going --

THE COURT: But it sounds like what you're saying, you want the traditional bankruptcy protections to be in place for Old Consumer.

MR. LAMKEN: Exactly. Exactly. Because if Old Consumer and, you know, as LTL's telling us, you know, even --

THE COURT: But you just said that you're looking primarily at LTL in connection with this case and Old Consumer is kind of off to the side.

MR. LAMKEN: So we would for financial distress look to LTL. But remember, what is supposedly funding this bankruptcy? It's an unsecured funding agreement backed by J&J and JJCI. So if they face legitimate financial distress, there's every reason to be worried about not supervising what

they're doing, every reason to believe that they shouldn't be paying equity ahead of injured talc victims.

THE COURT: Well, if you're a claimant, isn't the only thing that you're really concerned with is that they pay up as to what they say they'll pay up for?

MR. LAMKEN: No, Your Honor. I think who gets paid first is critically important. If I am left waiting my turn as people are passing away, that's very different than the absolute priority rule where equity doesn't get paid until I'm paid first. That's a hugely different endeavor. It's entirely different in terms of the incentives, as I pointed out. Why is J&J and JJCI going to push this through bankruptcy if they can continue paying equity, if they can spinoff divisions without bankruptcy court supervision? If they continue their operations just as before, then there's no reason for them to push this through. And LTL has no reason to push this forward and have a reasonable plan because they're made for bankruptcy. They have no assets, no operations --

THE COURT: So you're saying is through the backdoor, equity is coming out whole. Whereas, if it had been Old Consumer in bankruptcy, the absolute priority rule would've played out differently.

MR. LAMKEN: It may well be, Your Honor, but we don't have to guess at an answer because the rules are there to make sure that happens. And we don't just -- and we don't set aside

the rules and say, well, we're going to play monkey business with the absolute priority rule and allow this elaborate scheme where you take one set of claimants out because it might work out in the end. There's no sort of it might work out in the end exception to the absolute priority rule where you get to pay equity as you go and certainly not without consent, certainly not without a bankruptcy court supervising what's going on. That's what we count on the bankruptcy courts for.

THE COURT: What's your thought about individuals who may be exposed but the exposure is not really realized until years, years down the road?

MR. LAMKEN: Right. And so look, first, you know, if we're worried about the interests of future claimants, future claimants would be as much protected by a JJCI bankruptcy as an LTL bankruptcy. That just simply doesn't answer whether or not you should take this concocted made-for-bankruptcy entity and put it in bankruptcy with just the talc claimants alone. If bankruptcy serves future claimants better --

THE COURT: Your suggestion is that all these cases should be out of bankruptcy?

MR. LAMKEN: Pardon?

THE COURT: Your suggestion is that all of these cases should be out of bankruptcy?

MR. LAMKEN: That's exactly right.

Everybody should be treated the same. Either all the

creditors are in bankruptcy or all the creditors are out. Either all the assets are in bankruptcy or all the assets are out of bankruptcy. And that's for future --

THE COURT: I assume that would protect people who were exposed years down the road. They would not be subject to bankruptcy, of course. But they would be protected.

MR. LAMKEN: Yes, they would have their claims as they come up and as they realize they're injured.

And look, this is not the first mass tort that has something of a tail to it where people end up getting sick over time at later in time. There's lots of mass torts like that. There was Vioxx from Merck. There's the diet drugs litigation. These things happen and the tort system has ways of handling them.

Now, if there is other reasons and a legitimate basis for going into bankruptcy, well, bankruptcy has ways of handling it too. But concern for future claimants is not itself a reason for bankruptcy. And there's a little bit of an irony here that we have Johnson and Johnson asserting that it's concerned about future claimants when its position in this litigation is that there was no asbestos, no one was injured, this is just a matter of a litigation lottery and no one should receive anything.

If we really are interested in the interests of talc claimants, listen to the talc claimants. There's just not one

here telling you that they'd rather be in bankruptcy, that they really don't want be in the tort system that 50 states have used for nearly 200 years.

THE COURT: Well, let's assume we find or come to the conclusion that it was a good faith filing. What do we do with the stay? Did the bankruptcy court exceed its jurisdiction?

MR. LAMKEN: So I think the bankruptcy court did exceed its jurisdiction because even if one assumes that LTL is a proper debtor, and that's our debtor, that has consequences. And that means when you're looking at 362 and an automatic stay, that applies to the debtor. And what the bankruptcy court did here is it stayed over 670 actions against over 670 non-debtors, including debtors that have their own independent, own tortious conduct, non-derivative liability, and that just exceeds its jurisdiction.

And to get there, the district court, or excuse me, the bankruptcy court looked at two things. It talked about mostly supposedly shared insurance and indemnification agreements. But the key finding on that is on Appendix 159 where the court accepts, I'm quoting, that "Any claim of shared identities of interest is based solely on the allocation of agreements to the debtor on the eve of bankruptcy," and here's the cure part, "for the very purpose of extending the stay."

The court, in essence said, look, even though the purpose of this indemnification agreement which we allocated to

LTL, even though the purpose of having shared insurance was to extend the stay, that's a good enough reason to give a stay to companies like Johnson and Johnson that have their own tortious conduct. And that's just error twice over.

Combustion Engineering makes it very clear that contrived agreements for purposes of creating jurisdiction just can't be given that type of weight. Because otherwise, jurisdiction can be created by consent.

THE COURT: What's the usual way that you would argue that there is jurisdiction?

MR. LAMKEN: For non-debtors?

THE COURT: For a stay under 362 that would affect non-debtors, correct.

MR. LAMKEN: So the usual way you would find that is if you found something that's akin to an identity of interest where, if there's liability by the non-debtor, that is automatic liability for the debtor. And no ability of the bankruptcy court to intervene and say, yes, I know the non-debtor is liable, but I'm not going to let it dissipate the assets of the debtor. So --

THE COURT: And in that context, is it core jurisdiction or is it by virtue of arising under or arising in? Or is it related to jurisdiction?

MR. LAMKEN: So I think the better answer is to adhere to the text of the statute, which says only the debtor

for 362(a)(1), actions against the debtor, literally. When you go to --

THE COURT: But we know what courts tend to do, practically speaking. They tend to use 105 and they say, we're going to extend it because there is this "identity of interest" or there is insurance that's being paid out for the non-debtor that would likely be also covering the debtor itself. Therefore, you don't want to dissipate the insurance so therefore, you fit under 362(a)(3) and we're going to combine the two, (a)(1), (a)(3), along with 105, and go from there. And it looks like a lot of courts just tend to deal with it practically.

I was just looking for some cases and we found one by Judge Posner on the Seventh Circuit. You know, it says, no, it wasn't all that much analysis, it's the right thing to do.

MR. LAMKEN: Yeah, and I think the right-thing-to-do theory really is relying on 105 because 105 is sort of the necessary and proper clause that says, "Well, it's necessary and proper." But 105 doesn't create its own jurisdiction. You have to go find jurisdiction under another provision of the Bankruptcy Code. And the problem with 105 is, and here in particular is, you'd have to have the necessary findings in order to invoke it and the findings just are absent.

For example, for indemnification, the ordinary rule is it has to be automatic indemnification. If you need another

lawsuit for the indemnification to occur, as under Federal-Mogul and W.R. Grace, if you need another lawsuit, then it doesn't count for 105 because the bankruptcy court can intervene when the other lawsuit is filed against the debtor. And there's simply no finding, and I think LTL concedes this on Page 96, that LTL would certainly face "automatic indemnity obligations." And so it just falls short under W.R. Grace and under Federal-Mogul.

And second, even apart from the fact that these are all eve-of-the bankruptcy indemnifications for the purpose of establishing jurisdiction, the 1979 JJCI agreement, that can't really establish even for Old JJCI an indemnity obligation because that covers only liabilities that are allocated on the books or records of J&J as pertaining to its baby division. But there were no talc liabilities in 1979 allocated to Old JJCI at that point. And it doesn't really expressly indemnify J&J for its own tortious misconduct. And to indemnify a company for its own tortious misconduct, you typically have to have language regarding fault, negligence, culpability, something like that in there. There's no language like that in the 1979 agreement.

Finally, I see my red light is on --

THE COURT: That's fine. You're on our time.

I'd like to go into what the benefits and detriments are in considering a 524(g) channeling injunction or trust, if

you will, versus the mass tort system because we've had a lot of *amici* file briefs one way or the other.

The theme seems to be of the debtor that the 524(g) trust can be set up. It's adequately funded along with the claims coordinator already in place. The claims coordinator has a proven track record of ferreting out valid claims from invalid claims and you can do estimations and everything can be resolved in one single venue. And their point is, what's wrong with that?

MR. LAMKEN: All right.

So first, I think you don't get to a remedy like 524(g) until you have a legitimate good faith bankruptcy in the first place. And so that would not solve our problem with the lack of good faith, the fact that we've hived off one set of creditors, talc victims, for differential treatment, the fact that we've taken the actual assets of the entity and put them outside bankruptcy.

But one of the problems here is that 524(g) has been distorted by that as well. Look, for a 524(g) trust, the idea is you take the debtor's securities and you put them in the trust with a right to dividends, it says that in the statute, so that you have sort of that ongoing evergreen source of funding so you can keep coming up with more assets to pay future claimants. What this court in a footnote referred to or quoted Congress as saying that you have a goose that can "lay

golden eggs" and continuously fund those victims.

But what happened here is, because we swapped out debtors from J&J and somebody with an actual operating business, Famous Brands, to somebody who's just a made-for-bankruptcy entity, you've swapped out a very different goose and it's a goose that doesn't lay golden eggs. It just is a goose with a right to have a funding agreement. It's an unsecured funding agreement, subject to defenses, and that's just inconsistent with Combustion Engineering which says on Page 248, it says, look, implicit in this is that you need an ongoing operating business.

And that's reinforced by Section 524(g)(2)(B) because that says that you could only have this sort of 524(g) trust when your debtor was named in litigation at the time of the bankruptcy. And that forecloses the idea of having --

THE COURT: But that seems to be hyper literal in this case because in the end, the LTL I think probably already has been named in cases, has it not?

MR. LAMKEN: No, Your Honor. I don't think it's hyper literal in the following sense because it serves an important purpose. Congress wants the real tortfeasor, the real guy who has an operating business to be the one operating the 524(g) trust because then his securities go into the trust. By requiring somebody to have been named when they declared bankruptcy, it ensures that you have a real company there, not

a made-for-bankruptcy debtor like LTL that has no real operations and it has no assets --

THE COURT: But we have a real company and liquidating 11s are allowed, and specifically, Integrated Telecom tells you in Footnote 4 that oftentimes you have liquidating 11s and, in my day, we had quite a number that were filed in the 80s, or at least in the 90s all the time.

MR. LAMKEN: So, Your Honor, you know, it's possible that if you had a consensual plan, people could agree to having something like LTL be putting its securities, whatever those might look like, in a 524(g) trust. I don't think it's consistent with the statute, but one could conceive of it. But this deprives the claimants of that choice, right? Now, the debtor that would put its securities in it is LTL, this made-for-bankruptcy entity that doesn't have operating divisions. And everything that it's guaranteeing, everything that is, you know, sort of pledged in some sense that, you know, there's an unsecured funding agreement, all those assets are now being spun-off by J&J and won't even be assets there until it's funded anymore. So I think it just completely upsets the whole idea of 524(g) of taking the debtor's actual securities.

THE COURT: But what would be the best approach? I mean, there are a lot of heartbreaking stories here and it's very difficult to come up with a right game plan for everybody. From your perspective, what would be the best approach --

MR. LAMKEN: I think --

THE COURT: -- for these very difficult cases, these talc related disabilities?

MR. LAMKEN: So I can speak from my perspective and my clients. And from my perspective and my clients, they are happy to go forward with the traditional tort system that has operated in this country to compensate people for 200 years. But if --

THE COURT: How long would that take?

MR. LAMKEN: Your Honor, I don't know how long it would take, but I know that these things do move very quickly. For example, you know, Judge Robreno downstairs, 186,000 talc resolutions, Vioxx resolved, diet drugs resolved. The tort system can handle these mass torts. This is not the first. But that also doesn't in the end tell you, what are you going to have? Is it okay to just go have a JJCI bankruptcy, or are we going to allow there to be this concocted entity, LTL, with only talc victims, no other creditors and all of Old JJCI's assets sitting outside bankruptcy. That goes too far.

THE COURT: But I think that -- I mean, part of what Judge Fuentes is asking is which system is better, the MDL system or the bankruptcy system, for resolving these types of claims in an orderly way and getting money as quickly as we can to people with valid claims?

MR. LAMKEN: So under this structure, I can tell you

there's a clear answer and it's the tort system, because if you look at Bestwall, when you separate the assets and the ability to operate from the bankruptcy system, when you take only the talc claimants, only the victims and put them alone in bankruptcy, bankruptcy bogs down and you go five years without a plan, without anybody getting compensated. Before that --

THE COURT: But with Bestwall, it has been five years. But in this case, we don't know. If bankruptcy is found to have a valid purpose here and it goes back, I don't know when it's going to be over. But it does seem, based on what some people have filed, that MDLs take a long time.

And well, perhaps you can have Bellwether Trials. Most of what you do is discovery. You send it back to the other courts. You hope to somehow at some point you can get a settlement discussions going, but that also can take many years.

MR. LAMKEN: Your Honor, I agree that no system is perfect here. But we're the ones looking for compensation and we're happy to be in that system, which can sometimes be slow, but it can also move very quickly as the examples I gave you show.

But in the end, I don't think courts should be in the position of saying I think bankruptcy is better because it's more efficient or I think tort is better because it's more consistent with other values like having jury trials and

individual justice. I think that the answer is if you have a bankruptcy that has been structured to bypass the traditional bankruptcy protections, which is what you have here, that is not a good faith bankruptcy. If the purposes are to benefit the parent, the corporate parent, which is the case here, that is not a proper bankruptcy.

THE COURT: So in your world view, any equities with respect to which system is better or worse shouldn't be baked into the equation?

MR. LAMKEN: I don't think that is because it comes very, very close, Your Honor, to litigation advantage, who thinks which system is better.

Is this better for the victims? Is this better for the defendant or the petitioner? That's just not someplace the court should be. And one of the reasons for that is you kind of in the end have to ask more efficient, better for whom. And in this case, if you look at it, there's supposedly $61 billion available for funding.

THE COURT: I mean, the problem if you're a claimant is it looks like in a lot of these cases you either get a home run or a strikeout.

MR. LAMKEN: Well, I think the framers understood that juries can sort those sorts of things out. And if you get a strike out, it may well be because the jury determined that you didn't have specific causation, that whatever your

condition is, it was caused by something else. And that's --

THE COURT: Well, Mr. Feinberg could probably do that much more quickly and much more efficiently than having a full blown trial.

MR. LAMKEN: Well, Your Honor, I think that's right. But the Seventh Amendment tells us that if you want your jury trial, you're entitled that jury trial. And the framers understood that the community, the people of the United States who sit in the dock and make the decisions, we trust them to sort those things out. And the fact that some people win and some people lose, we trust that the juries are able to sort that out. And the notion that somehow bankruptcy may be more efficient, that's just not a good basis for having a bankruptcy case because in the end, even if it's more efficient, who for is it more efficient and who is it benefitting?

Here, if there's anything under $61 billion that's ultimately distributed in this bankruptcy, and believe me, when a plan is proposed by J&J, when that happens, if it happens, it's going to be well short of 61 billion. Anything short of that, all those efficiencies, all that extra, that accrues to equity. This is not more efficient for claimants. It's more efficient and better, perhaps, only for equity.

If I may reserve any remaining time for my rebuttal. I thank you very much.

THE COURT: We'll give you plenty of time for

rebuttal.

MR. LAMKEN: Okay. If there are further questions, then I'm happy to entertain them.

THE COURT: I've got quite a few, but we'll come back.

MR. LAMKEN: Okay. I'll brace myself here.

THE COURT: Why don't we get Mr. Frederick, or I guess Mr. Janda --

MR. LAMKEN: Thank you very much.

THE COURT: -- and then, we'll get you back.

MR. JANDA: Thank you, Your Honor. And may it please the Court. Sean Janda for the United States Trustee.

I think it's helpful to start by just taking a step back to understand what's really happening here. At bottom, J&J has carved off one set of disfavored creditors' claims, handpicked a selection of assets, and sent only those claims and only those assets into bankruptcy. If that carefully constructed bankruptcy is permitted to proceed, those claimants will be held hostage against each other with no claimant receiving any money until enough claimants agree to take whatever drips LTL chooses to release from the spigot of the funding agreement.

THE COURT: I'm going to ask you a variation of the question I asked of Mr. Lamken. Let's assume, instead of 1979, that LTL was formed in 2010 when the first cases really started

coming, or maybe 2014 when they saw that the cases were for real. And so you had good assets, bad assets, LTL gets the liabilities in connection with the talc. So let's, it's now been since 2014, let's say eight years, would you still be objecting if LTL now filed for bankruptcy in 2022, 2021?

MR. JANDA: So I think there's two different pieces here, Your Honor. The one piece is the sort of valid reorganizational purpose piece, whether there's the sort of financial distress that makes bankruptcy a legitimate choice. And then the other piece is the sort of subverting the structures and purposes of the Code.

And on the second piece, you know, I think it's hard to say exactly where the line is. In this case, the fact that this scheme was implemented two days before the bankruptcy filing was enacted, it’s very obvious --

THE COURT: I get it. You're saying the optics aren't good here, but I'm trying to -- you're writing an opinion here. Where's the line?

MR. JANDA: And I think, as Mr. Lamken said, the line is whether these machinations or the scheme was undertaken to try to subvert the principles of the Bankruptcy Code. And so it might be the case that if it happened in 2014 with bankruptcy on the mind, that might be enough. It might be the case that if it happened in 2014 with sort of valid business purposes on the mind, it wouldn't be enough. It's hard to give

a very clear line.

But this case I think very obviously falls on one side of the line. And I don't think the Court needs to say too much more than that to find that this sort of integrated transaction very much undermines sort of a number of fundamental purposes and structures of the Code.

THE COURT: Where we left off with Mr. Lamken was the reasons to have a 524 channeling trust versus the mass tort system. Do you have any thoughts on that?

MR. JANDA: I mean, I think the most important thing is, with all respect to the Court, that's not really the Court's job to make the determination about which system is more equitable or which system is fairer or better. That's Congress's job. And Congress has created the 524(g) process that sort of assumes a preexisting valid bankruptcy. And once you are in bankruptcy, Congress has determined that in certain clearly defined circumstances, a 524(g) trust might be the best resolution in those circumstances.

Congress has also implemented, you know, the MDL procedures and other procedures to try to make the resolution of mass claims more efficient to balance, the competing interests in that circumstance. But the overarching thing is that Congress has determined that the strong medicine of the Bankruptcy Code is necessary or is appropriate in certain circumstances, and really I think the sort of job of the Court

is to figure out whether those circumstances are met, not to figure out whether at the end of the day one system or the other system is better or fairer or more efficient.

THE COURT: Can the fear of a lot of litigation, tens of thousands of cases and huge jury verdicts, can that satisfy this financial distress concern?

MR. JANDA: So it depends on the particular circumstances. I'd point the Court to SGL Carbon which has a very long discussion of this. In SGL Carbon, the test that this Court implemented was sort of an immediate financial difficulty test and so it could be the case that litigation fees or judgments that had been entered are such that there is immediate financial difficulty. But this Court in SGL Carbon sort of specifically rejected the idea that the prospect even of financial and operational ruin from a judgment, at some point in the future, is not enough to satisfy that test.

And in this case, as we explain in our briefs, I mean, LTL had access to the $61 billion funding agreement before bankruptcy. I don't think anyone is going to stand up here and tell you that there was any immediate concern that the $61 billion would be exhausted, that it wouldn't be enough to satisfy judgments in the short term or to pay the litigation costs in the short term. And so just under the SGL Carbon test that this Court implemented, LTL was not in financial distress. But --

THE COURT: When you consider financial distress, I asked Mr. Lamken, do you consider Old Consumer and LTL or just LTL? And he answered LTL, initially. What do you say?

MR. JANDA: So I think this Court, again, has made clear and Congress has made clear that really bankruptcy is intended to benefit the debtor. And the debtor here is LTL. And to the extent that LTL, you know, wants to take advantage of carving off this set of claims, I think it has to, as Mr. Lamken suggested, if it's going to live by the sword, it has to die by the sword in that way.

And LTL I think narrowly focused (indiscernible) and as I said, no one would tell you, I don't think, that LTL was in any sort of immediate financial difficulty. That being said, if you zoom out, the question might be --

THE COURT: But wouldn't the argument be that LTL is in financial difficulty, it's just that here it happens to have a very, very big backstop, two backstops, in fact, Old Consumer and Johnson and Johnson?

MR. JANDA: I don't think so, Your Honor. I mean, the rights under the funding agreement give it access so long as it's not in bankruptcy. I mean, the money sort of disappears as soon as it files for bankruptcy but give it access when it's not in bankruptcy to $61 billion. And to the extent that as the bankruptcy court suggested that LTL exercising its rights under that agreement, would have negative

effects on J&J or on Old or New JJCI, and I think that just goes to the concern that this bankruptcy is primarily intended to benefit non-debtors who have not submitted themselves to the supervision of the bankruptcy court, who haven't complied with the obligations of the Code, and that as this Court made clear in BEPCO is just not a valid bankruptcy purpose.

THE COURT: So there were some very, one could argue on one side, far out projections by the bankruptcy judge here as to what the potential liability can be or the range of liability, I think at one point, up to 190 billion, which is significantly more than the $61 billion backstop as provided by Johnson and Johnson and Old Consumer. In that case, would LTL, if that's true, would LTL be in financial distress?

MR. JANDA: No, Your Honor. And I think -- so the briefs obviously make clear that there are a lot of assumptions baked into that number that are not necessarily valid or supported. But even assuming it's true, and SGL Carbon makes clear that the test is not all of your potential liability or all of your potential costs sort of stretching out into the future, it's whether there's immediate financial difficulty. And no one is contending, I don't think anyone's going to get up here and tell you that there was that sort of immediate financial difficulty with LTL.

THE COURT: So the key word used in SGL Carbon was premature and your point here is, at this point in time, today,

it would be premature for LTL to say it's in financial distress?

MR. JANDA: Correct. And I think SGL Carbon makes clear that it's not just because it's premature but because in some ways it's speculative, right. You don't know how suits are going to turn out. You don't know what costs are going to be in the future. If you have an operating business, it is sort of --

THE COURT: I think it's just another way of saying premature. I can speculate but it's not, we don't know.

MR. JANDA: Correct. But I think thinking about it as speculation helps explain why the bankruptcy court's findings on this are really problematic because they are speculation. They're based on assumptions that are not necessarily supported and that, you know, may or may not turn out to be true. But certainly, there's nothing that justified in the short term the invocation of the strong protections of the Bankruptcy Code.

THE COURT: Well, let's assume we reverse the bankruptcy court, what would litigation look like going forward and does J&J have any direct liability?

MR. JANDA: So my understanding, Your Honor, and we're obviously not involved for the most part in the tort cases. My understanding is that at least some of these judgments have been entered against J&J directly whether sort

of that's appropriate, whether there will be more, I have no idea. You know, I think if this Court concludes that the bankruptcy petition should have been dismissed, at that point, J&J or JJCI sort of, or LTL merged back into new, I mean, who knows what would happen, they could make a decision whether they wanted to continue in the tort system or whether they thought that they were facing the sort of financial difficulty JJCI to justify invoking the protections of the Bankruptcy Code.

At that point, they would submit themselves, all of their assets to the supervision of the bankruptcy court and would comply with the Code's obligations. And, again, that's just sort of fundamentally really the problem here is Congress has given very strong protections to entities facing financial difficulty and has determined that sort of the shield of those protections is necessary and is appropriate in circumstances where the person or the entity taking advantage of them submits itself to the Code, submits itself to the bankruptcy court, complies with the many obligations of the Code.

But here, I think sort of LTL or J&J is trying to turn what should be that shield of bankruptcy into a sword by not complying with any of the obligations and by trying to get sort of full resolution indefinitely into the future without undergoing any of those obligations that Congress has determined are required.

THE COURT: Is the biggest concern that the U.S. Trustee's Office has that the optics of this just don't seem normal for the type of bankruptcy that is allowed by the Code in America?

MR. JANDA: So I don't think this is about the optics of this, Your Honor. It's about just fundamental subversion of the Code. I mean, the U.S. Trustee cares very deeply about the structure and the integrity of the Code. And here, I mean, as we explained in our briefs and I'm happy to go through the sort of transaction, the scheme here, just undermines --

THE COURT: So let me try it another way.

LTL has existed for a number of years. LTL has massive liabilities in connection with and potential liabilities in the future, suits being filed every day, with regard to its talc products. When can LTL be safely assured that there won't be an objection of the Trustee if LTL files for bankruptcy protection?

MR. JANDA: And with apologies, I don't think I can give you an answer that you're going to find satisfactory on that. I have no idea what in sort of other circumstances the Trustee would or would not decide to object to. I mean, the key here and we don't think LTL was in financial stress. We don't think there's a valid reorganizational purpose. We've made that clear. But I think the biggest problem from the Trustee's perspective is the subversion of the Code, is the

sort of playing games with these really fundamental, important rules of the Code. And to the extent that a particular bankruptcy wasn't doing that, I think the Trustee's interest --

THE COURT: And just to sum up, the most important rules of the Code in your view are?

MR. JANDA: And I think we will focus on three things. One is the priority rules that creditors and equity holders have to be treated in a particular way. Equity doesn't get anything until creditors are paid. And here, equity has been getting stuff all along while creditors languish in bankruptcy.

Two is the idea that, I mean at its core, the Code sets up a fundamental quid pro quo where an entity submits itself to a lot of obligations of the Code and the supervision of the bankruptcy court in exchange for the Code's protections. And here, that's just not happening.

THE COURT: It sounds to me like you're talking about Old Consumer, you're not talking about LTL.

MR. JANDA: So, Your Honor, I think there's sort of two things here. And one is, to the extent that the Court wants to focus sort of just on LTL --

THE COURT: No, but I'm just following along with your answer.

MR. JANDA: I mean, I think the point is that LTL has filed for bankruptcy I don't think anyone would disagree to

benefit JJCI, to benefit J&J, and those sorts of benefits to non-debtors are just not contemplated by the Code. The Code is for debtors who submit itself to its obligations and the point of this bankruptcy isn't to benefit LTL, it's to benefit the non-debtors who haven't submitted to the Code's obligations, who haven't done the sort of financial disclosures, who haven't had the supervision of the bankruptcy court, who won't have the supervision of the bankruptcy court. And that's just not an appropriate purpose for the very strong medicine the bankruptcy court provides truly distressed entities, which again, LTL was not at the time that it filed.

THE COURT: And any other bankruptcy principles that you think are violated. You mentioned two.

MR. JANDA: And then, I mean the third one I think is sort of in with the second one is the idea that in addition to complying with the obligations of the Code, it's the debtor who submits itself to the supervision of the bankruptcy court and sort of ensures that it's acting in a way to maximize creditor returns. And here, again, J&J, JJCI just haven't submitted to that supervision. So that, to the extent that it's separate from the second regarding sort of the various other obligations of the Code that J&J and JJCI are not themselves complying with.

THE COURT: If tort litigants prefer to have their day in Court, doesn't it seem wrong that Old JJIC can decide

otherwise by taking advantage of the bankruptcy system?

MR. JANDA: I think that depends on the particular circumstances, Your Honor. I mean, obviously --

THE COURT: I think that was a softball.

(Laughter)

MR. JANDA: Well, so Congress has constructed the Bankruptcy Code and Old JJCI might well be able to file for bankruptcy and might well have been able to take advantage of Congress' protections even in the face of objections from tort claimants. I think in this case, obviously, tort claimants are being uniquely disadvantaged relative to equity holders and relative to J&J's other creditors. And that's something that's just not contemplated by the Code or by, I mean, anything else that Congress has done. I'd say Congress has established procedures for resolving mass tort litigation, even mass tort litigation that involves substantial liability and has determined that those procedures best balance the relevant interests in the context of mass tort.

THE COURT: Thank you very much.

MR. JANDA: Thank you.

THE COURT: We'll hear from Mr. Frederick and then we'll take a break after that.

Welcome.

MR. FREDERICK: Thank you, Your Honors. And may it please the Court, David Frederick for the Arnold and Itkin

appellant. I'd like to reserve three minutes of time for rebuttal.

I'd like to emphasize two points in my presentation. The first is that your cases, Third Circuit cases, should compel reversal. BEPCO, SGL Carbon, and Integrated Telecom, all set out the appropriate tests for determining what is good faith in a bankruptcy. In this situation, LTL fails the relevant tests for financial distress and good faith in promoting a bankruptcy. And I'd like to go into that in a minute.

But my second point is that there is no limiting principle to LTL's position. They cannot tell you when any other corporation would be constrained from doing exactly what they have done, not just for a mass tort, but for any significant liability. Johnson and Johnson is a company with a market capitalization of a half a trillion dollars that throws off dividend income for its shareholders at the rate of $10 to $11 billion a year, that boasts that for 59 straight years, it has increased its dividend.

And so if Johnson and Johnson can get away with filing a bankruptcy to hive off its tort liabilities for talc claimants, what's to stop any other company in America from doing the same thing?

THE COURT: It sounds to me like you're saying is if the backstop, instead of 61 billion for these types of claims

were, pick a number, 5 billion, then wouldn't LTL be in financial distress enough that it should be able to take advantage of the bankruptcy system?

MR. FREDERICK: Well, I think that you go through the normal test, Judge Ambro, and one of the reasons why I think my colleagues have resisted this hypothetical, which I think you're searching for where is the line to draw.

THE COURT: Right.

MR. JANDA: And I think that the answer to that is that you're going to have to assess was there a good faith purpose and emphasize is the LTL in your hypothesized construct an ongoing concern? Because one of the purposes of a Chapter 11 is to take a business that has an ongoing economic value and preserve and help through the bankruptcy rules that entity emerge out of bankruptcy. You don't have that here.

THE COURT: But liquidating 11s are allowed. I mean, Integrated Telecom tells us that.

MR. FREDERICK: That is true. But that is also why in this Court's decisions in BEPCO and SGL Carbon, it looked specifically at whether or not the entity claiming bankruptcy in order to use that process to evade certain litigation responsibilities had a parent and that the parent could either provide financing or bail it out of whatever financial difficulty it was in.

And so you have exactly that situation here where J&J

was paying the talc liabilities and it paid the Ingham judgment. That's undisputed. So it was on J&J to pay that. It chose to create an accounting fiction by shifting the liabilities on paper to JJCI. But Johnson and Johnson did it. Johnson and Johnson paid. And there's no reason, Judge Ambro, under your hypothesized situation one wouldn't look at the circumstances for that bankrupt entity to determine, yes, it's got a commitment for 5 billion, but is there some other mechanism by which it could get financing in order to pay other claimants?

Now, if I could go to some of --

THE COURT: The usual one would be, if in some way it had something going on, like the royalties coming and possibly DIP financing, I don't know. But I mean, if you are a claimant, it would seem that this bankruptcy is about as good as you can get absent getting punitives to have your claims determined, estimated, and paid.

MR. FREDERICK: Wrong. I'm sorry, Judge Ambro.

THE COURT: That's fine.

MR. FREDERICK: That is not correct. Sixty-eight hundred talc claimants have already settled. There has not been a single settlement since they filed for bankruptcy. What the bankruptcy does is it bleeds the oxygen out of the room for settlement by making every last claimant wait until there is not just a final plan confirmed but all appeals have been

exhausted. So there might be a --

THE COURT: But that sounds like what you're -- the problem there is, the stay that was given by the Court under 362.

MR. FREDERICK: No. The problem is the funding agreement. The funding agreement by its plain terms --

THE COURT: And during the course of the appeal, you have a built-in stay without having asked for it.

MR. FREDERICK: That's exactly right. But the funding agreement also says no money flows until the last appeal has been exhausted. And so when you deal with any kind of complicated bankruptcy in which there might be multiple plans --

THE COURT: That the last appeal has been exhausted per that individual claim or per the case as a whole?

MR. FREDERICK: The case as a whole. No money flows.

And that's the problem that the funding agreement is not the be-all end-all to this for the claimants. And, Judge Fuentes, you asked exactly the right question which is, who's better off in such a system. And there's no reason to think that where J&J, which knew of talc liabilities for asbestos in 1969 and was found to have engaged in reprehensible conduct, would not also be liable for judgments for these victims for the asbestos in a product that seemingly is innocent.

They've paid more than $92 billion over the last six

years to their shareholders in dividends and through stock buy-backs. So there's no question that outside the bankruptcy system in which J&J is being benefitted as a non-debtor that they would be obligated to make payments for their own culpability for these people's problems.

THE COURT: Let's go back to Judge Ambro's hypothetical. So if you were on this panel, would you venture to write an opinion identifying the line? Or would you say, on these facts clearly not a legitimate or a good faith bankruptcy?

MR. FREDERICK: Judge Restrepo, I think fairly, I would urge the Court to say the precedents of your Court compel reversal and explain why. In doing so, some of those features of what constitutes a reasonable way to draw a line will emerge, but I don't think it's appropriate in a case essentially a first impression where you're looking at the Texas two step as the first appellate court to do that. You're looking at an entity that is not what Johns-Manville did and what was the precursor to 524(g). But it is a closed-end capped system in which Johnson and Johnson has an incentive to fix the value of the funding agreement by spinning off that agreement which is permitted under the funding agreement itself so you have an entity that is not like any other entity out there.

And so to say, preemptively, these would be the

circumstances of which that would be permitted, respectfully, feels advisory to me. It doesn't feel necessary. And given the creativity that led to the Texas two step phenomenon in which not a single one of these entities has ever emerged with a confirmed plan and in the meantime, we've had victims of all of these various torts go without a remedy, I don't think it would be correct or appropriate for the Court to create a roadmap for corporations to continue to do that. That should be subject to the warp and woof of litigation.

I would like to, though, address Judge Ambro a couple of your questions.

THE COURT: Sure.

MR. FREDERICK: You asked whether it was appropriate to look beyond LTL at JJCI. I think that the way that you appropriately do it under your cases is to look just at the debtor and you look at the debtor's financial distress at the time of filing. It is an eminent financial distress test for the debtor. And the reason why you do that is because the Code instructs that the debtor is going to be subject to the strictures of the Code and the opportunities that the Code presents. And so looking beyond that is not the way you start.

Now, your cases have also looked beyond the actual debtor to determine whether or not such things as financial distress is appropriate and so I can't say you shouldn't do that. I think it is appropriate in this case to look at what

the assets are available by Johnson and Johnson to provide additional liquidity and additional remedies for the debtor. But that's not typically where you start. The problem here, though, is that as Mr. Lamken pointed out, what LTL is seeking to do is to create a disfavored set of creditors. It is only the talc victims that are subject to this bankruptcy and the strictures created by the bankruptcy.

Now, Judge Ambro, you also ask which system is better. Now, leaving aside the academic discussions that I'm sure will ensue as soon as you have written --

THE COURT: We've seen them already.

MR. FREDERICK: -- this opinion, I would just say that -- I would say a couple of things. For settlement and providing remedies to victims, the tort system is unquestionably better. Why? Because Johnson and Johnson has every incentive to engage in negotiations that are going to inure to its benefit, but will pay money. So the 6,800 talc victims that have already received a settlement from Johnson and Johnson was because Johnson and Johnson decided it was time to settle with them.

Now, it might have been that the law firm that was the firm superintending those particular claimants proposed a trial threat. That is a perfectly valid reason for J&J to decide we want to settle with that law firm and get them off the board.

THE COURT: And the tort system pays money also, doesn't it?

MR. FREDERICK: That's what I'm saying. That's what I'm saying. You can't do what I just said in bankruptcy. You can do it in the tort system. And that has happened in the tort system. It's no secret that the way that the company would go about doing is from a top down. We are afraid of this law firm and we do not want to go against them in court. We're going to resolve those cases for that law firm, or we're not afraid of this law firm, but we think if we can set a low enough floor by settling out cheap, then that becomes the market price. And companies do that all the time. It is a perfectly rational way to go about resolving these.

That could happen in the mass tort MDL system. And it does not happen in bankruptcy because of the way the classes of the different creditors are set up and the voting rules that go along with relieving that system from the stricture of the bankruptcy rules.

Now --

THE COURT: Just a factual question. For some reason, I had assumed normally that punitives are not available in bankruptcy. But when I look at the briefs, there's not a strong statement that that's one way or the other. Are punitives available in a bankruptcy?

MR. FREDERICK: Well, we're now talking about

negotiating. I think that the question of does a bankruptcy confirmed plan take into account punitive damages, I don't think the law is clear on that point. There is unsettled --

THE COURT: I agree.

MR. FREDERICK: And so the question then is, what can you negotiate and what is confirmable as a plan? Here, the anomaly is that Johnson and Johnson was hit with a higher level of punitive damages than Old JJCI. Why? Because it was the parent company that was misleading the scientists. It was the parent company that was dealing with the FDA and other foreign regulators with respect to asbestos.

And so the parent company was viewed by juries as more culpable for the reprehensible conduct than the consumer entity. And so when you look at the multiple upheld by the Missouri Court of Appeals in the Ingham case, that's why Johnson and Johnson was hit with higher punitives.

Now, how you would do the valuation of that in a confirmation of a plan, I hope that we never get to that because I would fervently urge you to rule that this was not a good faith bankruptcy. But I would suggest that that will be a much litigated question that will further delay the finalization of any bankruptcy plan.

You asked, Judge Ambro, about what if LTL had been created years earlier? I think part of the test of what you look at is whether it was still part of the parent company and

that the parent company was continuing to finance. In which case, I don't think you would find financial distress. But again, the test would be under SGL Carbon and Integrated Telecom, whether there was immediate or imminent financial distress at the particular time, years later, that it was seeking to declare bankruptcy.

But the second thing I'd like to say is that under that construct, one of the reasons why the Texas two step is so problematic in bankruptcy is that it does not provide for asset maximization for creditors. It is designed to starve off the claims of creditors who are claimants in the tort system.

And that purpose is a very important purpose of a Chapter 11 because the idea of allowing the reorganization is so that you can maximize the assets available to the creditors. But the Texas Divisional Merger Statute, as conceived and implemented in these various cases that are pending, doesn't do that at all. It tries to create a fixed cap. And, in fact, that was what the J&J treasurer said in July of, the year that, July of '21, that they were seeking to cap their talc liability. And so --

THE COURT: Yeah, but if they cap it at 61 billion and it turns out in a lot of the briefing that I've seen from your side that the actual amounts are going to be far less than that, does that make much difference?

MR. FREDERICK: We don't know and that's the problem,

Judge Ambro. I can't give you a definitive answer to the question of what the value or what is going to be maximized or not. What I can tell you is that the incentives for J&J are to drive the number as far down as they can and to wait out the talc claimants who are dying at some, you know, horrible rate every day while we're waiting for this. And that's where the incentives are being drawn in this case.

The problem that you also have with this is that you're targeting one particular class. So, Judge Ambro, if you're going to talk about any of the features that might go into what would be an acceptable plan for this, you have to take into account the fact that any kind of divisional merger that is seeking to skive off particular liabilities is going to treat all the creditors the same way so that if an entity like LTL goes into bankruptcy at some point in time, it has to meet the financial distress test. It has to meet the maximizing creditor value test. It has to have a valid purpose and not be for litigation. But it also can't target one class over another so that the current creditors of LTL, or J&J for that matter, get benefits that only the talc claimants uniquely suffer from.

So I think --

THE COURT: But in the course of a plan, I mean, you would have a classification under 1122 or whatever it is that specifically puts these people into their own class, would you

not?

MR. FREDERICK: Well, if you did that, you are talking about an inordinately large class which creates its own confirmation challenges and problems. And you're also dealing, respectfully, with people of different ages, different conditions, different states of ovarian cancer or situations with respect to mesothelioma. So you've got -- it's a much more complicated situation and that's why in the tort system, the way these are traditionally done, is that a group of cases will be settled and then a special master will be designated by the court to go through the circumstances of each individual claimant and determine based on that pop that has been achieved what each person is going to get. That is a much more challenging feature than would I think in the bankruptcy system.

THE COURT: All right. Thank you. Then we'll get you back on rebuttal.

We'll take a -- do you want a 10-minute break or a 15-minute break, gentlemen?

UNIDENTIFIED SPEAKER: Whatever you like.

THE COURT: What do you guys want?

UNIDENTIFIED SPEAKER: Ten.

THE COURT: Ten-minute break. The boss spoke.

(Recess taken)

THE COURT: Mr. Katyal, whenever you're ready.

MR. KATYAL: Thank you, Judge Ambro. May it please the Court.

I very much appreciate the argument of my three friends and I'd like to start by discussing three interlocking problems with what you just heard. Now, my friends said a lot and if it's okay with the Court, I'd like to take about four minutes, not two --

THE COURT: Fine.

MR. KATYAL: -- to try and describe these three points because they reinforce each other.

First is the narrow scope of your review. At this point, you're being asked to decide two questions. First, was the petition filed by LTL made in good faith, and second, should protected party litigation be stayed.

Now, my friends' arguments about harm to the claimants is premature. Those are plan confirmation questions, or at least ones for the 524(g) 75 percent vote. After all, as Judge Ambro reminded my friends, Congress handcrafted a specific solution to asbestos bankruptcy cases, which among other things requires a super majority to approve a plan. What my friends are doing is taking all of their complaints about the bankruptcy process and pushing that all into the good faith question. Those are questions for plan confirmation, not ones for today.

What is before you today is the bankruptcy court's

conclusion that LTL acted in good faith. That court spent five trial days hearing from witnesses and crafted two detailed opinions, all of which rejects what you just heard. The standard to overturn Judge Kaplan is daunting. As the Supreme Court in Lakeridge put it, "Factual findings are reviewable only for clear error with a serious thumb on the scale for the bankruptcy court."

Or as this Court just said in I-Fiber (phonetic), "In a complex case where the bankruptcy court does substantial work in seeking to understand the facts, great care must be exercised to defer to those findings." As for the other questions about protected parties and the stay, the bankruptcy court identified five separate bases for an injunction, and even the U.S. Trustee doesn't dispute them. That's the first point.

The second, the transfer of liability. Much of my friends' argument hinges on the notion that J&J, not LTL, last year evaded claims by restructuring. But the key fact is this, J&J didn't owe anything, didn't owe anything for these claims last year. J&J didn't owe anything the year before. J&J didn't owe anything for the preceding 43 years. That is because in 1979, J&J transferred its entire baby business and all of that liability to JJCI, a separate entity. And JJCI agreed to fully indemnify J&J for all claims.

So what actually happened last year? JJCI

restructured and created two entities, New JJCI and LTL. Every dollar that the Old JJCI was liable for, every dollar of its own conduct and anything alleged by J&J, the New JJCI had agreed to pay 100 percent. The restructuring and bankruptcy petition didn't debate anything. It was a full one-to-one placement. Indeed, it was even more than one-to-one for reasons our brief explains.

Now my friends say, well, they represent the victims and speak for them. That proves our point and proves Congress's point. They are all current claimants. Our argument is that each of their tort lawsuits has tunnel vision. It examines only their individual case and delays future ones. It's a home run or a strikeout and precious few get up to bat. The only way to get a system wide resolution that's comprehensive, that protects future claimants, is through bankruptcy.

Third, and finally, they ignore several key limiting principles of our argument, particularly Mr. Frederick, and four things make this case unique. First, a latency period of nearly 50 years with many, many future claimants who can't get any relief now and who risk not getting paid.

Second, wild lottery style judgments like Ingham, including some for billions, and a massive number of cases, 40,000, with more filed every hour of every day of every year, creating a tsunami of litigation.

Third, Congress has expressed handcrafted rules for asbestos bankruptcy cases under 524(g), including a 75 percent super majority requirement and a rule that two courts, not one, a bankruptcy court plus a federal district court, must approve the plan and scrutinize it for fairness and equity, and D, finally, all -- or fourth finally, all in the context of a 1979 full transfer of liability from J&J to Old JJCI, as well as Old JJCI providing full indemnity back to J&J.

So this isn't a case of a parent dumping its liability the day before restructuring or anything like that. J&J has not been liable for decades. In short, nothing in the restructuring hurts the claimants. And even if you disagreed, the proper time to evaluate that is far down the road, and here you must just simply decide whether the petition is filed in good faith.

THE COURT: The blank response when you hear about the divisional merger statute and how it's used and people use the name pejoratively, Texas two step, is why didn't you just file Old Consumer? Life would be so much easier.

Now, you might still have a battle as to whether there was financial distress, but it would at least be arguably a cleaner battle.

MR. KATYAL: So, Your Honor, there's several responses, but the most important one is the one that the bankruptcy court gave after listening to the testimony. And

you never really actually heard a response to it from my other side which, as Judge Kaplan found, is if you forced that entity, Old JJCI, to go bankrupt, it would have "a horrific impact" because Old JJCI makes all sorts of -- JJCI makes all sorts of things like, you know, Bandaids, Tylenol, things like that.

THE COURT: It sounds to me like only that's an attempt to preserve goodwill, which of course has been earned over the years. But it sounds like the argument that's being made from your side is that it's a whole lot of inconvenience, a whole lot of inefficiency, a whole lot of harm to goodwill and why not allow this more creative way to separate out the bad from the good.

MR. KATYAL: Your Honor, that is part of the argument. It is not by any stretch the whole argument.

So just to take a step back, I think what the Bankruptcy Code would ask is the relevant question is, is the bankruptcy petition maximizing the value of the debtor's estate. That's the goal, the purpose that we are isolating from Page 120 of Integrated Telecom.

So I don't think the Bankruptcy Code says you're to burden debtors for their own sake. You're supposed to do it because in some sense, it's going to maximize the value. And so one thing, and this is my first answer to you, what Judge Kaplan found is that you are maximizing the value by going

through the divisional merger statute, because otherwise there will be actually less money available including to claimants because of the loss of goodwill, the loss of all that, you know, forcing the entire company into bankruptcy, all the different findings he found.

Now another key part of this is there's two possible reasons I think my friends isolate for why you'd want this larger entity, to force this larger entity to go bankrupt. One is because you want to guarantee the amount of money that this larger entity, JJCI, has for claimants. And that's exactly what the funding agreement does.

THE COURT: So does Old JJCI qualify for financial distress?

MR. KATYAL: We believe it does, as does LTL --

THE COURT: So if it --

MR. KATYAL: -- as my friend, the U.S. Trustee --

THE COURT: If it does, then isn't it the real party in interest?

MR. KATYAL: Well, I don't know if it's a real party at this point because LTL is the one that filed the petition. We agree with Judge Kaplan. Either way you slice it, whether it's LTL or JJCI, there's massive financial distress. And I can go through that evidence.

But I do want to first really deal with your first question because I think it's the heart of what --

THE COURT: Excellent. They're dovetailing together.

MR. KATYAL: Yeah, they dovetail. But Mr. Lamken really spent a lot of time on this idea that Old JJCI was the entity that had to go bankrupt.

And our first point to you is the one main reason why he's isolating is because you want claimants to get paid. But this funding agreement gives the entire value of JJCI, the entire value, $61 billion free and clear to the potential claimants so that entire pot of money is available.

Now my friend says maybe JJCI will squander the assets and that's why you need bankruptcy court jurisdiction, maybe they'll transfer it to equity.

The funding agreement, this is quite important to our argument, the funding agreement itself bars that or if it occurred if there were any payment to J&J or to shareholders or anything like that, distributions, all of that increases the $61-billion pot; $61 billion is only a floor, not a ceiling.

I'd like to walk you through the language of the funding agreement so that you understand so that it's clear why my friend's argument is wrong.

So the funding agreement says that you would take the greater of either, one, the fair market value of Old JJCI immediately prior to the divisional merger. That amount is $61.56 billion, that's Appendix Page 7422. Or it says it's the fair market value on the date that LTL and the new JJCI refused

to pay under the funding agreement. That's at Appendix Page 4316 and 4619.

Here's the most important point about 4619. If a hypothetical that my friend says happens and it materializes that JJCI does something to try and give J&J money to -- you know, in the form of distributions or something like that, that just bumps up the amount of the funding guarantee under the agreement. That is Page 4319.

So the funding agreement solves for exactly the problem. We don't think there's anything in the Code that requires, of course, you know, the larger entity to declare bankruptcy. But to the extent you're worried about it, to the extent you're worried, oh, you know, maybe this is going to create some bad incentive, the funding agreement does that. And here's the second most important point. J&J guarantees that funding agreement, not just JJCI.

In the current world, in the pre-restructuring, pre-bankruptcy baseline world, they could maybe try and sue JJCI. We know those lawsuits take time and so on. We could talk about that in a moment. But the most important point is whatever their lawsuits would get, it would only get up to $61 billion and not even that because that money is not free and clear. It would be subject to all of the other creditors that JJCI have and stuff like that.

And, of course, there's no J&J guarantee under the

pre-restructuring world.

THE COURT: Let me work backwards. When do funds come out of the funding agreement to pay claimants in a bankruptcy?

MR. KATYAL: So under the terms of the agreement, first, LTL has to pay whatever they have. And then New JJCI is to pay whatever they have. And then afterwards, anything else if there's any excess, it goes to --

THE COURT: What about the points Mr. Frederick makes that no monies come out until all the appeals are resolved?

MR. KATYAL: Well, I think that's true of course in the regular tort system in the bonds under Rule 62 of Federal Rules of Civil Procedures. I don't think that's any different from the standard system.

And, of course, here I think you've got to grapple with Judge Kaplan's finding that there are -- you know, 49 trials have happened, Your Honor, to date in all of these cases.

THE COURT: Thirty-five have gone to verdict, right?

MR. KATYAL: Yeah, very very few out of --

THE COURT: So 18 you won, 17 you lost?

MR. KATYAL: Yeah. And then some of those were reversed on appeal. And as Judge Kaplan said, you know, we have a very good batting rate for all of the reasons that our briefs explain. But, nonetheless, at the end of the day,

there's going to be financial distress because of the massive number; 40,000 lawsuits and more being filed every day.

THE COURT: Well, let's go back to you said the full amount of all assets of Old JJCI are available to pay claimants. So, once again, you come back to my question. Why not file Old JJCI in the first place?

MR. KATYAL: Yeah, for two reasons. One is it would reduce the number of the dollars actually available to claimants because, forcing as Judge Kaplan found, Old JJCI into bankruptcy reduces the value of JJCI.

THE COURT: Except you've got a company that has -- is ongoing with very very profitable products that have been well earned over decades.

MR. KATYAL: And that's exactly Judge Kaplan's point, which is you don't have to -- because of the funding agreement because you get all of the good without the bad, you get the full value of the company not subject to any creditors or anything like that. It's free and clear up to $61 billion, and then you get a backstop from J&J.

And remember my friends, their brief says J&J has better credit than the United States government. So in terms of which deal is better for the claimants, for all the claimants, not just my friends sitting at the table but including future claimants, which is a huge chunk as Congress noted in 524(g) because of the latency period for asbestos.

THE COURT: If I understand you correctly, if I'm hearing you correctly, it almost sounds like J&J did this to benefit the claimants. They had the claimants' best interest at heart and then they do this Texas Two Step.

But the timing doesn't suggest that. The timing suggests that this was really done for a litigation advantage. As I understand it, LTL is created four months after the Supreme Court denies cert in the Missouri litigation, and the next day they declare bankruptcy.

So how do you reconcile that for me because I'm a little troubled.

MR. KATYAL: Absolutely, Your Honor.

And this is exactly what my friends said to Judge Kaplan, and he rejected it on the facts, not litigation advantage but four separate purposes.

The first purpose --

THE COURT: But you concede that there is a litigation advantage by doing this?

MR. KATYAL: Well, I think it's a byproduct of this. Absolutely.

THE COURT: So there is a litigation advantage?

MR. KATYAL: Well, I think it's a byproduct but, as Judge Kaplan found, that wasn't the reason.

LTL has been transparent. There's been lots of discovery on this that Judge Kaplan referred to and said, no,

the reason for this is four-fold: First, that there's huge defense costs to the tune of two- to five-million dollars per case multiplied by as many as 40,000 cases. You didn't hear a word from my friends, they had a lot of time up here, they didn't have an answer to what Judge Kaplan found. That's a huge deadweight loss.

Every one of these cases costs us millions to fight, and even if the claims are meritless. So that's all money that could be going to the claimants but now is not going to the claimants. Instead, it's going to pay attorneys.

The second is, as I was saying to Judge Ambro, the horrific impact is what Judge Kaplan called the massive disruptions that would endure if Old JJCI was forced into bankruptcy. That's at Page A-47.

Third, the equity concerns for future claimants, which is of particular concern here given Congress' hand-crafted statute in 524(g) and this very long latency period. We understand my friends have to zealously represent their client before this Court. They represent current clients.

What Congress is telling you is there's a worry about latency and about future claimants, and this is a solution that's comprehensive for everyone.

And, lastly, Your Honor, it's because Judge Kaplan found that the bankruptcy process is a lot faster than the tort process. My friend talked about 6,800 settlements but doesn't

mention what Judge Kaplan said about that, which is he said two things: One, that will be dwarfed by the 40,000 cases that have already been filed and the many more that will come and, also, he said that the past number of settlements won't occur in the future -- and this returns to your question, Your Honor -- because of Ingham.

What Ingham did was basically create a shiny object for folks to try and keep their cases in the tort system with the hope of a lottery-style big pay day. Some people will get home runs. Most people, Judge Kaplan found, don't get a turn at the bat.

That's what J&J -- excuse me, that's what LTL was dealing with in this restructuring and that's why the funding agreement is written the way it does. It provides my friends as well as future claimants a guarantee of at least $61 billion.

Now, Judge Ambro, I think you pointed out, well, there's some kind of contradictions here, how much are the claims really worth. You know, and Judge Kaplan, of course, talked about that in his opinion. He said --

THE COURT: Yeah. I didn't see any strong defense of his 190 billion.

MR. KATYAL: Well, it's up to 190 billion. And it was just the defense costs. And he got it by simply saying two to five million dollars per case multiplied by 40,000 cases.

THE COURT: But it was the high end of every --

MR. KATYAL: Correct. And we're not defending necessarily --

THE COURT: -- every case.

MR. KATYAL: -- the high end, of course.

But we do -- we are defending vehemently Judge Kaplan's conclusion after hearing from expert after expert including Dr. Bell about the level of financial distress that the company faced. And my friends are asking you to re-weigh the evidence and say, oh, well, these lawsuits actually don't impose as much of a present liability or this or that.

Judge Kaplan evaluated all of that and found financial distress, including most significantly in 2019 the Consumer Division had a $2.1 billion profit. And just the very next year because, Your Honor, because of Ingham along with other talc litigation, they had a $1.1 billion loss in one year. And talc liability, Judge Kaplan found, was responsible for that.

If you look at the years 2018 to 2020 --

THE COURT: Talc liability was responsible for a significant portion of that, wasn't that correct?

MR. KATYAL: Correct. Yes, a significant portion of that.

And the talc litigation, for example, Judge Kaplan found from the years 2018 to 2020 costs 32 -- 27 percent of all

costs of Old JJCI and 32 percent in the year 2021.

THE COURT: But coming back to the -- at the outset, if you have a parent company and it has a subsidiary that's changed its name but the subsidiary's been there for 43 years. And the subsidiary has a major problem with one of its products that's caused mass tort litigation and some fear of what could happen in the future.

Usually what happens over all these decades is you file the subsidiary and you go from there. The concern -- and you said that all of the assets of Old JJCI will be put into play for funding the claimants' claims that are valid. And you look at the next case, I think as Mr. Frederick said, and you're worried about, okay, you don't have a Johnson & Johnson consumer, you have Acme, you know, Acme, Inc.

I don't mean the grocery chain, by the way. I apologize to them. I'm thinking of the old Warner Brothers cartoons.

But that they don't have 61 billion. They are there with maybe four or five billion at tops. They're going to run out of things, and they're saying we're going to do this divisional merger and go from there. And you can see that the slippery slope comes into play and people are saying let's stop this before it really gets out of hand.

MR. KATYAL: Right. Totally.

THE COURT: That's the concern.

MR. KATYAL: We are very sympathetic to exactly that argument, Your Honor. So refer to three points. One is you're exactly right that the ordinary course is a subsidiary would declare bankruptcy. That's your own opinion joined by Judge Fuentes in In re Owens Corning back in 2005. That's exactly what happened. That's what this Court approved.

Second, we're not here defending something in the absence of a funding agreement. If there is no funding agreement, that valid bankruptcy purposes that Judge Kaplan isolated those four look very different. They look like litigation advantages.

But here, if you were to ask what is the litigation advantage that is served that could somehow dwarf Judge Kaplan's four different findings of valid purpose, it would be -- you're hard pressed to do so because this deal gives -- this restructuring and this petition gives actually more to the claimants, now all the claimants including future claimants.

And that's what Congress is telling you've got to do.

THE COURT: This funding agreement has a bifurcation. It will fund in bankruptcy and out of bankruptcy. Isn't that correct?

MR. KATYAL: I believe it only funds in bankruptcy. I mean --

THE COURT: So what's it do outside of bankruptcy?

MR. KATYAL: I don't think it has any life outside of

the bankruptcy.

So, you know, basically it's a --

THE COURT: So in Ingham when Johnson & Johnson stepped up and paid, it did it for what reason? Because of a judgment was against it?

MR. KATYAL: So, actually, it's just flatly wrong, Your Honor. Ingham was paid not by Johnson & Johnson.

THE COURT: Okay.

MR. KATYAL: It was paid by JJCI. I don't know where my friend is getting that from. And, you know, indeed, I can point you to different parts of the record which directly contradict what he's saying.

THE COURT: Of the 17 verdicts or of the portion of the 17 verdicts not overturned on appeal, how many of those verdicts also were against J&J?

MR. KATYAL: I think some may have been against J&J for derivative liability or something like that. But all of them were paid for by JJCI or now LTL. Every one. Every dollar.

And so, you know, the 1979 agreement actually is written to say it's a full transfer of liability to JJCI but it also says full indemnification for J&J and everything has to be paid for by JJCI or now LTL. So any suit against J&J at any point is always going to be paid by now LTL. That's the logic behind Judge Kaplan's finding on question two about whether the

stay should be extended to protected parties.

THE COURT: One of the questions I asked the other side, more than one counsel, is when you look at this picture, are you taking into account just LTL or LTL and Old JJCI, and their answer uniformly was LTL.

It sounds like from what you're saying that part of the equation here is taking into account Old JJCI.

MR. KATYAL: Well, we think actually -- we agree with the U.S. Trustee that the relevant question is actually is whether LTL as the petitioner is facing financial distress, but we can understand why Judge Kaplan also made findings on Old JJCI which --

THE COURT: Yeah, because he specifically -- he meshed them together.

MR. KATYAL: Yes. He found either way that there was going to be financial distress. And so we agree with -- you know, we agree with the way Judge Kaplan approached it. So either way, whether you look at LTL and the litigations they faced or you looked at Old JJCI and the litigations they face, either way it's going to meet this Court's test for financial distress.

What Mr. Frederick said is take a look at the three cases that this Court has decided, BEPCO, SGL Carbon, and Integrated Telecom. We very much want you to look at those cases because all three I think are miles away from this case.

In BEPCO, there were six litigations in total, six. In SGL Carbon, six complaints in the United States, one in Canada. Integrated Telecom, a whopping one securities case at issue there.

And most importantly, each of those cases --

THE COURT: But in -- let's just take for example SGL Carbon, it looked like what was being done was ultimately to file for bankruptcy and in the end when you have a dissolution, it will be under state law that will return equity back to the equityholders which one would under the absolute priority rule in bankruptcy not see happening.

MR. KATYAL: So I think -- you know, I think SGL Carbon really goes on the notion of few litigations and this is done for litigation advantage. That's Page 124 and 125 of that decision.

Of course, here to the extent you're worried, Your Honor, about what my friends said about somehow money being paid to equity and a violation of the absolute priority rule, as I was saying, the funding agreement captures that because every dollar that goes to J&J from JJCI in the form of a distribution at Page 4319 of the record makes very clear this funding agreement says that just bumps up the value of new JJCI, the amount available to the claimants.

THE COURT: How would you propose in the example I noted that you'd have a much less funded entity in bankruptcy

and a much less funded backstop, how would you propose that bad consequences be blunted?

MR. KATYAL: Through the Court's review process. So -- and even before the review process, of course, was the 524(g) solution because 75 percent of the claimants would have to approve it and, Your Honor, as you said to my friend on the other side, you always have the possibility of filing an adversary action for fraudulent conveyance.

And, indeed, they tried some of that language in the bankruptcy court. They tried to suggest this was a fraudulent conveyance. But at this Court as this case comes to the Court, they dropped all of that out because I think it doesn't cut the mustard. Here this funding agreement is --

THE COURT: The only answer I got was it's premature to do so now. Let's figure out whether the filing was in good faith and then they'll cross that bridge when they come to it. I mean that's the answer that I got.

MR. KATYAL: Yeah. And I just don't think that ultimately answers the question.

And I just want to return for a moment to those three cases that my friend was referring to because pointedly they distinguish between those six or seven litigations and the many thousands, I think 16,000 that were at issue in Johns-Manville. And they said that is the kind of -- certainly the kind of flood of litigation that would create financial distress.

And here Judge Kaplan looked at the existing 40,000 litigations and said that is certainly enough for financial distress given the numbers, the testimony from Dr. Bell that I referred to earlier, and the like.

THE COURT: Is LTL fully capable of satisfying the talc claims?

MR. KATYAL: By itself without a resort to the funding agreement, we think the answer to that is no. But with the funding agreement, absolutely.

Our position, and Judge Kaplan found this too, is that we believe that $61 billion, which is of course only a floor, it could go up, is enough to pay a hundred percent of all valid claims. And when I say valid claims, it excludes two things. It excludes the deadweight losses of billions and billions of dollars paid to lawyers for defending against this.

So the bankruptcy system avoids that, as Judge Kaplan explained. And second, this gets to a question that, Your Honor, you asked Mr. Frederick, it excludes lottery-style punitive damages. You're absolutely right, we spent a long time looking trying to understand does the bankruptcy system bar punitive damages. I think the answer to that is, no, it doesn't bar them. And we certainly think that -- but we think that it would even it out to the extent there were any available.

The way that I think the process would unfold, Judge

Ambro, is there's been an estimation expert appointed by the name of Ken Feinberg, you know, obviously an expert in this field. He is going to look at the amount of liability and he could, I suppose and probably we'll get briefing on, should punitive damages be part of that estimation process.

THE COURT: Does J&J have any direct liability in this case? And given the 50-year latency period of these talc claims, right, does J&J have any direct liability or direct exposure?

MR. KATYAL: We don't think they have -- we certainly don't think they have any exposure. I'll walk you through the language of the 1979 transfer.

So it first transfers, quote, all of the business of the Baby Division to this subsidiary, JJCI, and all assets and liabilities. Judge Kaplan excerpted it at A-163 and A-164. And then it says JJCI, quote, agrees to assume all the indebtedness, liabilities, and obligations of every kind and the subsidiary will forever indemnify and save harmless J&J against all the indebtedness, liabilities, and obligations. That is a very very strong indemnification.

So J&J -- and that's why since this has been written in 1979, J&J hasn't paid a dime. It has always been Old JJCI. Now it's true there was a centralized account which is used in lots of parents and subsidiaries in which J&J initially may have sometimes paid that cash out. But as the record shows, it

was always booked back to Old JJCI. That's Appendix Pages 4107 and Appendix 8103.

And, you know, as I say, if you look at who paid Ingham, it was not J&J. It was JJCI.

THE COURT: Why would punitive damages be a factor to consider?

MR. KATYAL: Because I think -- and Congress was worried about this in 524(g). Because you have the massive number of future claimants with this long 50-year latency period, you have to worry that a $2-billion verdict in Ingham added to other punitive damage verdicts will take away from the ability of future claimants to recover.

That's why we're here, Your Honor. That's the purpose. You know, that's what Judge Kaplan found was the purpose based on looking at this evidence. I know it makes for a good story to say, you know, this big company that has all these profits is somehow trying to evade responsibility or something like that. And as I said, the agreements from 1979 on has always transferred all of that liability.

Now, Judge Ambro, you asked my friend on the other side, well, what if this were done in 2014 or what if the restructuring as opposed to now is the use of this Texas divisional merger statute, what is the problem there.

And I think the Bankruptcy Code takes the debtor's corporate structure as a given as it comes under state law.

And we followed here Texas law meticulously. And I think it would be a very dangerous rule for this Court if you were to start line-drawing. And I couldn't hear my friend's answer to the questions about line-drawing, is 2014 okay, is last year okay, is two days different or something like that.

And so I think that's one important point. The other is actually that 524(g) itself contemplates pre-petition restructuring, and I would point you to 524(g)(4)(A)(ii)(IV). Sorry about the --

THE COURT: The long statute.

MR. KATYAL: Exactly. It is a long statute.

But it provides that a channeling injunction can bar actions, quote, directed against a third party and arising by reason of its involvement in a transaction changing the corporate structure of the debtor or a related party.

And so if Congress thought that a full company is the thing that must declare bankruptcy, I don't think it would have included this provision in it. Rather, I think Congress anticipated basically that there would be pre-petition restructuring.

I think it's notable that my friends for all their saying they say we're inconsistent with the Bankruptcy Code, what provision are we inconsistent with? What provision are we violating? There's some meta principle I guess that they're isolating, but they can't point to any particular provision.

THE COURT: They're pointing out the gateway provision that you have to file a bankruptcy in good faith. And they're claiming that this was not done. So that's what we're talking about. That's the primary issue today.

MR. KATYAL: And if that's what they're isolating, we think Judge Kaplan found four different reasons why that -- why the valid purpose of bankruptcy has been served.

THE COURT: One just fact question, in terms of the proposal made here to deal with the liabilities of LTL and the funding, were those types of proposals, any variation of that made in connection with the MDL litigation?

MR. KATYAL: I don't believe the funding agreement had anything to do with the MDL litigation. Rather, as the Court found in --

THE COURT: Yeah, I'm just saying the concept.

MR. KATYAL: Yeah, I don't know about the concept. I mean I think the only thing I'm aware of is the Court's finding in A15 relying on their own expert that this was a single integrated transaction and so -- with the restructuring and funding agreement.

Now you had asked before, Your Honor, I just have to slightly correct something. I understand that the funding agreement does have provisions for funding outside of bankruptcy.

THE COURT: Yeah, that's what I thought.

MR. KATYAL: Yes. So I apologize for that. But our --

THE COURT: What are the opt-outs that are being considered?

MR. KATYAL: So the 524(g) process has --

THE COURT: People who can say I don't want to be part of the bankruptcy, I'm going to opt out and go forward with respect to my litigation.

MR. KATYAL: Yeah. So, I mean, I think Congress put that into the statute itself saying there has to be a 75 percent requirement for the plan and then, of course, there's two-court review. So there's a lot that has to happen.

And I think the most important point about that is --

THE COURT: You contemplate that this plan even though it's not yet in place will allow for any type of opt-out?

MR. KATYAL: I don't know that we have gotten that far. I think that's a pre -- to use a word from earlier, I think that's a premature question. But I would say that, you know, 75 percent threshold is of course very daunting. We are highly incentivized to put a good plan together because otherwise we get returned to the mass tort system with all of the uncertainty and all of the problems attendant to it.

And Judge Kaplan -- you know, my friend Mr. Frederick said he wants you to write a decision really about these facts.

We absolutely agree. Judge Kaplan has said time and again his goal is to move this thing incredibly expeditiously. My friends on the other side said they thought this process could be done as early as the first quarter of next year.

And Judge Kaplan has rejected time and again any attempt to delay the bankruptcy process which looks very different, of course, than what's going on in the tort system as Your Honor was asking my friends on the other side. Massive delay, only a few trials to verdict. And, you know, as Judge Kaplan found, future trials are going to be even more delayed and very few settlements because of the Ingham verdict and other things.

And so you are asked to compare two different worlds. One is the baseline of the pre-restructuring, pre-bankruptcy world in which Johnson & Johnson owes nothing, in which some people slowly get paid but that's subject of course to any other claims against Old JJCI, any recovery. There are huge defense costs, and future claimants risk not getting paid with all the latency.

And under the restructuring and the funding agreement, instead, you have a very different world, one with a $61-billion plus floor. That money is guaranteed free and clear. You have a faster process so current claimants get paid and future claimants have a voice at the table. They have a representative because that is under 524(g). And, of course,

the claimants, including everyone sitting at that table, will -- we have to persuade three-quarters of them that this is a fair and equitable solution and then we have to persuade two different courts about that, the bankruptcy court and the district court after that.

And we will have, you know, Ken Feinberg's estimation as part of that to start to break what otherwise has been an intractability between the parties.

THE COURT: Is LTL going to continue as a going concern afterwards or is this just a liquidating trust, in effect?

MR. KATYAL: Well, we suspect that, you know, LTL does have, for example a royalty business that will continue.

THE COURT: How much does that bring in a year?

MR. KATYAL: It brings in about $50 million, the record shows, a year and is worth about $350 million. So by itself, Your Honor, to answer one of your earlier questions, that isn't enough to -- that money isn't enough to avoid financial distress.

And so if LTL doesn't restructure and doesn't have the funding agreement available to it, then obviously, it's going to be under water and have all the problems Judge Kaplan referred to.

THE COURT: What do you make of the stay? Your friends, as you keep referring to them, are adamant that the

Court would exceed its jurisdiction with respect to the stay, issue number two.

MR. KATYAL: Yeah. We think that Judge Kaplan, as I say, he identified five reasons why there is and crucial to all five, and they're all independent of one another, they have to run the table. But I think one central idea he had is that this involves the same basic claims during the same time period.

And what he did is a limited stay against certain parties, and it's a surgical one. In order for a stay to occur, two things have to happen. One is --

THE COURT: Surgical with 670 parties?

MR. KATYAL: Yes.

THE COURT: Non-debtors.

MR. KATYAL: Yeah. Well, but again, Your Honor, we're talking about a massive amount of litigation. 670 versus, as I say, 40,000 claims that are currently in existence. I'll read to you the terms of this --

THE COURT: How many insurers are we talking about of that 670? Is the whole shooting match 670?

MR. KATYAL: I think it is; the whole shooting match is 670. The insurers, the list is at Pages A-249 and 250. I don't think it's very many. It's like AIG, Prudential, and the like. Let me read to you the terms --

THE COURT: How many retailers?

MR. KATYAL: The retailers are -- that's a three-page list at A-245 to '48. There are a number of them. It includes, you know, CVS and things like that. And here's what it includes, and then let me tell you what it doesn't include.

THE COURT: Okay.

MR. KATYAL: It includes two things: one, claims -- or two things must have to happen. The claim must first arise from the manufacture or sale of talc-containing products by Old JJCI or J&J and, second, that were asserted against or could have been asserted against Old JJCI. That's Joint Appendix Page 195.

And so it's not, for example, a stay on unrelated things like mesh litigation against J&J or anything like that. And it's done, and this is crucial, it's done for a simple reason, because if you can start suing, Judge Ambro, the retailers like CVS or the insurers, that reduces the overall pot of money that is available to the claimants, both present and future. And particularly in a world in which Congress has said a 75 percent super majority threshold that we have to convince --

THE COURT: CVS has its own insurance, right?

MR. KATYAL: CVS may have some of its own insurance, but certainly, you know, I think that there will be indemnification obligations that Judge Kaplan found were automatic at Page A-181. And so -- and I don't think automatic

is even the test, but even to the extent you thought it was, there were automatic indemnity obligations.

And so I think what Judge -- what the logic behind this stay is is that otherwise that limited amount of money will be going to these other things and, therefore, reduce our ability to actually persuade 75 percent of them to confirm a plan which is of course what Congress is asking for here.

Congress looked at the problems with the mass tort system, the problems with the MDL, which by the way here include no state claims, include no meso claims. It wouldn't include Ingham, for example. So -- and Congress decided that MDLs wasn't the way to deal with this specific problem.

And so return to an earlier question you had, Your Honor, about the precedent that's set, those four limiting principles that I said at the outset we think are crucial here. We're not saying that you can do this in other areas where you don't have a latency problem. But here you do. You have a huge number of future claimants, and Congress has isolated specifically that out.

THE COURT: But can be taken into account were one to get a settlement in an MDL.

MR. KATYAL: I'm sorry. Could you --

THE COURT: That could be taken into account were one to get a global settlement in an MDL --

MR. KATYAL: But an MDL will never give you the stay

that --

THE COURT: -- litigation.

MR. KATYAL: An MDL will never give you the stay on litigation that is necessary to craft a kind of comprehensive plan. All an MDL does is coordinate pretrial proceedings. And --

THE COURT: But they often do result in settlements.

MR. KATYAL: They may result in settlements, but in order to, Your Honor, I think to go that way, you're going to have to jump over Judge Kaplan's findings about settlements in which he found that because of Ingham and because of a variety of other things, the past settlement rate is no guarantee and, indeed, is not going to happen in the future, that fewer parties are willing to settle because of Ingham and because of other things like the FDA test and things he isolated at Joint Appendix Page A-41.

THE COURT: If settlement is a viable option in the context of a bankruptcy via a plan, of course, why would it not also be a viable option in an MDL?

MR. KATYAL: Because you don't have -- for one thing you don't have future claimants at the table. So Congress has specifically put in 524 --

THE COURT: But a settlement could have provisions for future claimants. Could it not?

MR. KATYAL: It could, but they don't have any voice

in the process. And so the incentive is -- as, you know, again, and I don't fault my friends, but their job is to zealously advocate for current claimants, their clients. There is no -- that's why I think Congress wrote the statute in 524 that it did.

And, you know, could you imagine some hypothetical world in which the MDLs do actually do all this? I suppose you could. It's just there's literally no evidence that that's ever happened in the amici briefs that are before you including I would suggest The National Association of Manufacturers brief at Pages 15 to 16 really goes into detail about the inability of MDLs to actually provide any relief or any settlements, actually, that generate payments to the claimants.

And so, again, to return Your Honor to the question you asked my friend on the other side, which is what's the more efficient solution, what's the way. We've gone through this process for year after year, and it's not working. Congress has given you a different approach, a different way to go in 524(g). And what we've done is, through the use of this funding agreement, provide a backstop that's much better than they could get under the mass tort system, not for any one of their individual clients but comprehensively and overall.

If I could, you had asked about the stay before, as well. And I'd also point you to I think the language of 362(a)(3) and this Court's decision in McCartney, which I think

as Judge Kaplan found was square precedent in saying --

THE COURT: How many of the 670 are J&J entities besides J&J itself and J&J Consumer?

MR. KATYAL: I suspect that most of them are not and you know -- are not J&J entities. And our point is not to benefit --

THE COURT: Roughly how many are?

MR. KATYAL: Your Honor, I haven't looked at those appendix pages. It would be I think it's Appendix Page 245 to '50 list all of the protected parties. So I'd point you to those. I just don't want to characterize them.

THE COURT: It's in the hundreds, is it not?

MR. KATYAL: I think there's many many other entities. Our point is this stay is not being done to benefit them. It's not being done to benefit --

THE COURT: Have they been sued in these various 49 actions that have gone to trial so far in the United States or almost went to trial, I should say?

MR. KATYAL: I'm not sure if they were sued in them. I'm sorry, Your Honor. I don't believe so but I'm not positive. I think there are litigations against them. And the purpose that we're seeking for the stay is not to benefit them or to benefit J&J. It's rather to hit pause and make sure that the corpus of funds is not available.

And we feel so strongly about this that if we weren't

able to get the 362 or 105 stay, this first question about financial distress and valid bankruptcy purpose doesn't help us. The petition is basically meaningless for the reasons Judge Kaplan found. We need that stay because otherwise plaintiffs will sue for these very same claims. They'll sue some other entity, and that will hurt us in forms of the indemnification.

THE COURT: But if it's not Johnson & Johnson or Johnson & Johnson Consumer, which have been involved in connection with this process, how could they possibly win against Johnson & Johnson, you know, Floor Covering or whatever?

MR. KATYAL: They'll be indemnified. So whoever the entity is that's sued, they'll be indemnified, they'll share insurance policies.

THE COURT: But the point being that the suit's not going to win against them. I mean Johnson & Johnson was the one involved until 1979 with the talc products Then it was Baby Products which later became Consumer, and now it's LTL.

These other entities in the hundreds, what I don't understand is why this stay is so broad.

MR. KATYAL: Because those are, and Judge Kaplan looked at the claims, the same claims. It's just a different place in the supply chain. And it's pretty common in these mass tort cases to sue, you know, everyone in the chain, the

insurer, the retailer, and the manufacturer.

And to be sure, we think at least with respect to suits against J&J, they wouldn't have viability. But as Judge Kaplan also found, you know, even a very low success rate is enough to create financial distress.

THE COURT: That's because of the indemnification agreements, correct? It would bleed --

MR. KATYAL: The indemnification, insurance.

THE COURT: It would bleed the fund.

MR. KATYAL: Exactly. It would bleed the fund. Exactly.

And, again, with a 75 percent threshold that we have to meet in order to confirm a plan, you know, if the fund is bled and insurance proceeds are dropped or things like that, it's very hard. And then there's also of course the possibility of record taint, as Judge Kaplan also found.

So those are all different reasons why the stay looks the way it does. And, you know, I understand it's a large number of parties, but it's a large number of parties for a very important reason. There's a large amount of litigation in this space, and 670 is an appropriate amount.

Now if you disagree and you're worried about it, as Judge Kaplan also said, I think it's at A-173, he will have the parties come back and have to continually justify the breadth of the stay. And, of course, anyone can come in and try and

lift the stay or something like that.

We're incentivized throughout this entire process to make sure that we move expeditiously and quickly to try and develop a plan that 75 percent of them can agree because otherwise, as Judge Kaplan has said, he's going to dismiss the bankruptcy petition. He said it's really important that this all move incredibly fast, and we are as incentivized as it comes to make sure of that because otherwise, we're stuck in the old pre-restructuring world.

THE COURT: And the U.S. Trustee is saying with respect to that, that's a matter for Congress in terms of picking one system versus the other.

MR. KATYAL: Well, we do think Congress has exactly picked that in 524(g), Your Honor. And so, you know, to be sure, if we violated some state law, violated the Texas divisional merger statute in some way, shape, or form, that's a problem and Congress would have to fix that by allowing something.

But here, we complied with everything in that statute. And the Bankruptcy Code takes state law as it finds it. And we understand that there's a way to abuse the divisional merger statute. We don't doubt that. It's just that in this case, we think you should write a limited opinion just as the bankruptcy court did that says with this funding agreement, this is a valid purpose and this is an appropriate

amount of parties to be stayed.

THE COURT: In connection with the stay, which Judge Restrepo brought up, an opening question I have is the jurisdiction of the Court, is it a core proceeding, in other words saying that it's core by virtue of 362(a)(1) dealing with a debtor or 362(a)(3) dealing with the debtor's property or is it related to?

I have a dumb question. If it's just related to and, therefore, non-core, doesn't a bankruptcy judge have to go to the district court with a report and recommendation and have the district court sign off?

MR. KATYAL: I'm always scared, Your Honor, when you ask a dumb bankruptcy question. I'm starting to get worried, but I think the answer --

THE COURT: I've said to a couple of people this is a dumb question, but --

MR. KATYAL: No, I think the answer is --

THE COURT: -- if it's related to --

MR. KATYAL: -- I think you have it exactly right that it is something that the district court would have to approve if it's related-to jurisdiction. Of course, here, it's 362 that we're placing predominant emphasis on and also the other parts of 105 under arising-in and arising-under.

And if I could walk you through that. So for 362(a)(1), there are two different theories the bankruptcy

court found. One is that this is -- these are lawsuits that are virtually against the debtor. And so he said it fits under the very first clause of a proceeding against the debtor.

And then he also said it's, quote, a claim against the debtor under the second part of 362(a)(1). We think the second part is the right way to think about this, that these lawsuits are in effect for reasons that Your Honor mentioned before effectively against the debtor, and it's a claim against them.

And as the Second Circuit said in Colonial Realty, that second part of (a)(1) has to have some meaning. It can't just literally be suits against the debtor. It includes third parties. At least here where the third-party lawsuits involve the same basic claims during the same time period.

And then there are questions about 105 and arising-in and arising-under. And we think there that, you know, the automatic stay is --

THE COURT: Well, arising-in and arising -- it's hard for me to say 105's arising-in or arising-under. Arising-under means it's explicitly given to you in the Code. Arising-under means it comes to you as a result of something else that's in the Code. 105 is sort of one of those things that implements something that otherwise may be given to you. It's --

MR. KATYAL: But I think here the theory is, and many courts have done it, including the court below, is to say that

362 is the thing given to you in the Code, the automatic stay.

THE COURT: As for the debtor.

MR. KATYAL: Exactly.

And then as -- in order to safeguard the vitality of that and to make that process work, you need a stay against others, not that the Court will adjudicate on the merits, of course, those other cases. It's just a temporary pause under 362 and 105 to make that process work.

THE COURT: My perception based on a lot of anecdotes over the course of years is that most courts just say, okay, we're going to be practical about this, we're going to put this in play and go from there. Basically it's a pause, we need this pause in order for people to negotiate on and on and on. And --

MR. KATYAL: And we don't --

THE COURT: And they glide over some of the jurisdictional issues.

MR. KATYAL: Yes. I certainly think that's happened. But I do think like the court in McCartney really did, I think, you know, go into some of those jurisdictional issues. And of course A.H. Robins in the Fourth Circuit really in detail tried to flesh out these different points.

But, Your Honor, absolutely, to the extent this Court is worried about the breadth of this stay, if you don't think it's surgical, we obviously do, but the remedy for that is that

very practical one which Judge Kaplan has already said he will do, which is to make sure and police this stay for the protected parties to make sure it is the same claims and that it is justified.

Were not here to try and just stop litigation for its own sake. We're doing it in order to protect the integrity of the process. And as I say, it's so important to us. The entire first question is just not helpful to us unless we have this stay in place.

THE COURT: You have about -- since you don't get rebuttal, as the appellee, I'm going to give you a chance to do some summing up.

MR. KATYAL: Great.

And if I could, there's just one -- I want to respond to one other thing my friend said on the other side --

THE COURT: Go right ahead.

MR. KATYAL: -- which is that JJCI could be spun off, he said, under this and that that will be problematic. But the funding agreement itself says that if there is a spinoff, Paragraph 4(b) of this and this is Appendix Page 4239, says that itself will be considered part of the fair market value.

So, again, this is an agreement that increases in value over time as JJCI increases in value. The claimants get the upside of all of it. And if they're -- to the extent they're concerned whether it's distributions or spinoffs, the

agreements itself polices those things.

And we're asking you here, Your Honor, for a limited ruling to affirm Judge Kaplan based on his factual findings. We know this is a painful case. We know this is hard for everyone involved. But Judge Kaplan in the very last page of his second opinion, he said, you know, delay is something that he thinks about all the time as the claimants die.

And the best way, the most efficient way to actually provide claimants with relief, both present and future, in an even-handed equitable way that avoids the deadweight losses of millions and millions of dollars being given to lawyers is through this solution.

And if you're worried about whether it's fair or not, they have remedies, the 75 percent vote, the two-court review vote. And that's why we think Judge Kaplan got it right.

THE COURT: Thank you.

MR. KATYAL: Thank you.

THE COURT: What we will do is we'll take about a five-minute break and we'll come back -- well, let's see. We'll come back at 4:30 and be out of here at 5.

(Recess)

THE CLERK: All rise.

THE COURT: Thank you.

We'll have rebuttal. Mr. Lamken?

Can I ask you one of the things, and maybe you're not

the one to deal with it but if not maybe Mr. Frederick can. How are you going to deal with the future claimants? How do you propose that be done?

MR. LAMKEN: So, Your Honor, I think that for future claimants, that doesn't tell us what an answer to my fundamental pitch which is it doesn't tell us whether you should have JJCI in bankruptcy or you should have LTL --

THE COURT: I agree. I agree. But the point is that if you don't have a bankruptcy, you're going to have an MDL process. And in an MDL process, how do you make sure that future claimants are dealt with fairly?

MR. LAMKEN: Right. And I think in cases like the diet drug cases, they did actually come up with a mechanism to deal with future claimants because those cases also have a tail. There are ways of appointing people in order to represent future claimants and come up with a structured settlement that will handle it consistent with due process.

But until we actually have a valid bankruptcy, we don't have a way of dealing with future claimants in bankruptcy. And I think that's really where I want to start with is, look, the difficulty here is we don't have a good-faith bankruptcy in the first place because the whole thing is structured to evade bankruptcy's principles.

THE COURT: So if we undo the bankruptcy, what happens? How does this case go forward?

MR. LAMKEN: There's two options there. One would be that J&J may decide we're going to put Old JJCI in bankruptcy. And then we actually have just like Johns-Manville, just like every other bankruptcy in history --

THE COURT: But how does that advance the ball for your client?

MR. LAMKEN: Well, it advances the ball in multiple ways. First, when it comes to the priority rules, it means that equity doesn't get paid ahead of creditors here. It means that we don't sit in bankruptcy literally dying while billions of dollar go out to equityholders --

THE COURT: But doesn't the funding agreement address that concern?

MR. LAMKEN: Actually, it doesn't. The funding agreement will increase the amount that's available by the amount that's paid to equity. But the absolute priority rule doesn't say go ahead and pay equity as long as you have an unsecured promise to pay an equal amount to creditors later on.

The absolute priority rule says until you have satisfied your creditors, you don't give anything to equity, at least not without their consent 75 percent and the court approval. And that is one of the reasons why it just fundamentally undermines the incentives here, because J&J can operate its businesses as before including all the assets of Old JJCI outside bankruptcy without bankruptcy court

supervision, paying equity, paying other creditors, while one category of creditors sits in bankruptcy.

And I think that's the critical thing is that you've actually taken one set of creditors, injured talc victims, and put them in bankruptcy alone. Trade creditors get paid ahead of us. We're behind, and that is a fundamental distortion of the bankruptcy process.

Since history, the way to do it is to just simply take your bankrupt company if you're financially distressed and put that company in bankruptcy. And I think the problem is that --

THE COURT: But their point is that no claimant with a valid claim fairly estimated is going to be out a dollar. Now there may be a significant delay if there is an appeal, but in the end, that full claim will be paid.

MR. LAMKEN: Your Honor, first, I don't think the Bankruptcy Code says you may follow my principles unless you give us an unsecured funding agreement that eventually may pay everybody. The Bankruptcy Code has structures that are meant to be followed. And if you've created your structure in order to evade those bankruptcy --

THE COURT: I think what they're saying is that this is a case that's *sui generis*. We're not talking about the next case. We're saying that with this, you are never or perhaps almost never ever going to get this kind of backstop again.

MR. LAMKEN: Not only that, Your Honor, but if this goes forward, if J&J can do this, this is actually the model for the future. Who wouldn't do a build-your-own bankruptcy where you choose, okay, which creditors I'm going to keep outside of bankruptcy and pay them right away, which creditors I'm going to put in bankruptcy and make them wait, which assets am I going to put outside bankruptcy, and which assets will I put in bankruptcy, or will I just put an unsecured funding agreement subject to defenses like if you fail to indemnify me, I can stop paying the funding.

Those are dramatically different things and with bankruptcy --

THE COURT: But I think what they're saying is that or the response to that would be, okay, the creditors that we paid before were because we hadn't gone into bankruptcy yet. Once we've gone into bankruptcy, those creditors, those claimants are all going to be treated in a way in which there won't be as many strikeouts as there might otherwise be if there were litigation.

MR. LAMKEN: So, Your Honor, to the extent that sometimes people prevail before juries and sometimes they don't, that's a function of the system that the framers established 200 years ago, where we entrust the common man, 12 of them, to make these determinations and to find facts and make determinations.

The notion that, well, bankruptcy might actually sort of even out the balance isn't a way of indicting the tort system that 50 states have operated to compensate victims for 200 years. But even setting that aside, that still doesn't answer the question of why LTL as opposed to JJCI? Why not take the company that was the tortfeasor, that supposedly was in financial distress and put it and its assets into bankruptcy to satisfy the way it's done it before?

And what we were told here is, well, the bankruptcy court looked at that and the bankruptcy court said, gee, that's going to be very costly. And I think the -- actually the court said it's too much value to waste. But when it comes to the Bankruptcy Code, it's not a waste to enforce the absolute priority rule so that people don't pay equity ahead of creditors.

It's not a waste to --

THE COURT: To further round that, I mean maybe it was just an offhand comment that Mr. Katyal made, but -- and I'm going to add on to it. Almost every right that's given to a creditor in bankruptcy like who is secured, who's not, is something that's outside bankruptcy. Non-bankruptcy law tells you who has these particular rights inside of a bankruptcy. And that's basically following the Butner case from '79.

Transpose that to the corporate area that corporate law is not affected by the bankruptcy. And corporate law

allows for a divisional merger. And if corporate law allows that so all that we are dealing, as you say, is just LTL itself, why is LTL not in some type of financial distress if that's the only one we're looking to and luckily has somebody who's willing to come to its -- meet all of its funding needs with respect to the future of the bankruptcy?

MR. LAMKEN: So, Judge Ambro, I think from the outset when we say we take the a debtor as we find them, when you're describing, when deciding good faith, under cases like the new debtor syndrome cases, courts ask who's my debtor, where did it come from, and why is he here.

And the answer to those questions here is whose my debtor, it's an artificial entity created for bankruptcy; why is he here, he's here so talc claimants will be in a single class by themselves in bankruptcy and everybody else is outside bankruptcy; why is he here, he's here so that JJCI's assets, its operating business is outside bankruptcy beyond the bankruptcy court's reach.

And only, only an unsecured funding agreement subject to defenses is available to talc claimants. That means that, you know, you don't just accept them as they find them when you have that sort of a purpose. And I think, Judge Ambro, that actually distinguishes the Chapter 11 rundown cases you described.

When you have a Chapter 11 rundown case as I

understand it, Goodco and Badco are both in the bankruptcy, both subject to the court's supervision. This is the exact opposite. One company is in bankruptcy subject to the court bankruptcy -- the bankruptcy court's jurisdiction. But everything else that happens, all of Old JJCI's assets as they're operated, this spinoff, everything else that happens --

THE COURT: What provisions of the Code if Old JJCI were in bankruptcy, what provisions of the Code do you think would apply that you would want to take into account with respect to Old JJCI?

MR. LAMKEN: So the absolute priority to begin with, which is not a specific provision of the Code, but it's an inflection from history and the structure of the Code where you don't pay creditors, you don't pay equity ahead of creditors.

And that puts a lot of pressure on people to come up with a good plan to the benefit of the creditors, and not do what Bestwall is doing now and let things go for five years as people are rapidly failing.

The second one would be --

THE COURT: And I should have asked this before. Spin out the absolute priority concept here. This is not like SGL where they're going to do a state court -- or a state dissolution and have all the money go to equity after the bankruptcy.

What monies are going to equity during the course of

this bankruptcy? Are you saying dividends? Is that what you're talking about?

MR. LAMKEN: Yeah, well, there's dividends and there's also $5 billion for a spinoff that was announced or $5 billion for a stock buyback that was announced last week.

So -- and the fact that you can continuously in bankruptcy pay equity means that there's far less pressure to actually achieve a plan that the creditors can live with. You can wait longer and longer just as Bestwall did.

But I'd also point to Section 363 which is your non --

THE COURT: Wait, you say stock buyback. The stock buyback is not for LTL. The stock buyback is for Old JJCI.

MR. LAMKEN: Exactly.

And the divisional merger was structured and the funding agreement is structured specifically to allow J&J to spinoff assets without anybody, any of our creditors, being able to do what they would be able to do under Section 363, if you had put the actual tortfeasor, the people funding this, JJCI -- Old JJCI into bankruptcy, which would be they get notice and an opportunity to be heard.

And the bankruptcy court would be able to supervise it and to make sure that those assets are indeed available to the creditors at the end of the day. None of that, none of that exists because instead of doing what one does ordinarily

and putting a bankruptcy -- the whole entity into bankruptcy, they've simply hived off one set of claims, put them into bankruptcy and taken all the assets, all the operating things and all the famous brands and operate them outside of bankruptcy.

And just I think the key thing here is Jevec makes it clear from the Supreme Court that it's just not permissible to say I have provided something that I think is better for the creditors. When you're talking about bankruptcy, the specific provisions of the Code are important. And the Code here ordinarily requires absolute priority rule, Section 363 supervision of spinoffs and other non-ordinary course transactions.

And even 524(g) requires that you put in equity securities, securities of the debtor, with a right to dividends. But we have now swapped out one debtor, a valuable business JJCI with famous brands, for a completely different debtor which is LTL.

And I'd like to sort of turn if I could for a moment to the injunction. And I think the serious problem with the injunction is this. Section 105 simply doesn't say you can reach out to non-debtors, 670 of them, and enjoin them on the basis of, well, gee, I think it has some relationship to the estate. You actually have to have a clear right to relief.

The problem --

THE COURT: What you're saying is that there's not an identity of interest other than the fact that it has the same corporate parent?

MR. LAMKEN: Exactly, Your Honor.

In fact, the record is very clear that you can't do this here because J&J has its own independent liability for its own tortuous misconduct. For example, in Ingham, as we've mentioned, J&J had a higher multiple on punitive damages because.

And I'll quote:

"Because defendants decision to chart their course of reprehensible conduct began long before JJCI was spun off as a separate entity."

J&J made all the health and safety decisions. It ignored its own scientists for decades on end. And actually, it worked tirelessly to make sure that industry standards would not change to make asbestos that's otherwise undetectable detectable."

That's on Pages 716 to 717 of Ingham and Pages 5841 to 5892. And it personally individually told -- falsely advertised that baby powder does not contain asbestos and never will and that it tested every lot to make sure.

And juries have repeatedly found J&J liable separately from JJCI. This is not a case of derivative liability. It is an instance of independent liability. For

example, Echeverria in California, 97.8 percent of the liability was given to J&J, not JJCI.

If you look at Page -- the verdict sheets on Page 4532, 4592, and there's a summary at 4704 and 4627. They are regularly giving more liability to J&J than JJCI, This is not a case of derivative liability where J&J because it's the corporate parent has some liability. This is J&J's own misconduct. And when one is going to enjoin that type of liability, you need more than what the Court came up with here.

For example, and even 524(g), if you want a channeling injunction, it says the channeling injunction and -- Combustion Engineering addresses this specific issue -- 524(g) says when you have a channeling injunction, it applies only to the debtor, and you can go beyond the debtor when the liability is derivative because it comes from those corporate relationships.

But the liability here isn't from corporate relationships. It's liability for J&J's own misconduct. And so you couldn't get a channeling injunction under 524(g) for the liability of J&J. Why under 105 on a preliminary basis are you going to give that injunction and prevent talc claimants from actually getting satisfaction when waiting for the possibility of a 524(g) plan? It simply doesn't make sense. It takes those statutory provisions and it sets them on their heads.

And the net result is there's simply no ability of tort claimants to come forward and have any ability to pursue a reasonable plan here because they're frozen in their tracks. J&J, it's got all the liability against it frozen. 650 other people, that's frozen. LTL, our made for bankruptcy debtor, frozen, as well.

What is the leverage they have? Nothing. It simply shuts everything down. And you can't do that under 105. You can't do that under 362(a) when it is its own independent liability. And there's a key provision here that I don't -- key finding by the district court that I don't think I heard Mr. Katyal mention, and it is this.

The district court found, and this is again 159, that the shared identities of interest were based on allocation of agreements to the debtor -- that means indemnification agreements that they hived off and gave to the debtor -- shared insurance agreements that they gave to the debtor on the eve of bankruptcy, quote, "for the very purpose of extending the stay."

That is an effort to create equity through agreements on the eve of bankruptcy. And that doesn't work for two reasons. One is Combustion Engineering saying you can't by agreement establish jurisdiction. But it also doesn't work as a matter of equity. As a matter of equity, two parties can't enter into a contrivance and agreements on the eve of

bankruptcy and say, aha, we now have a right to injure third parties and prevent them from pursuing other parties that have their own independent liability.

Ultimately, the problem here is that J&J decided to take a corporate shell, LTL, and put it into bankruptcy. But then it turns around and says now that we've put this corporate shell into bankruptcy, we want an injunction that protects not just the corporate shell, it protects us from our own independent liability, that protects retailers from their own independent liability, that protects everybody from their own independent liability.

But that's completely topsy-turvy. If we're going to accept putting LTL in bankruptcy, the automatic stay and any possible stay under 105 would extend to just LTL. It wouldn't extend to everybody else. But we really shouldn't be saying we're going to accept LTL as our debtor here because of the very purpose of putting LTL into bankruptcy was to make sure that talc claimants were treated differently or -- treated differently.

I know one of the questions that came up here was, well, how do we determine, what if it was, you know, 1994 when they did the divisional merger or what happens if it was 1979. And I think the short answer is two-fold. One is in this case, it was two days before bankruptcy. In this case we know exactly why it was done. It was done to manipulate the

bankruptcy. It was done to make sure that it was structured in a way where JJCI would be out of bankruptcy and -- or its assets would be out of bankruptcy and only talc claimants would be in bankruptcy.

And that provides a very clear answer alone. So it's not just a matter of time; it's a matter of what the purpose was. If we look back and we have a non-bankruptcy purpose for years on end that says, yeah, we've established this as a meaningful way, we've not only given liabilities, we've actually given them a business and they're operating that business for years and they're building up assets and goodwill. And it's a real company that's operating.

That's a very different scenario from saying we've now created a company solely for the purpose of bankruptcy. We've given it all the liabilities for just one set of claimants, and we've done it for the purpose of keeping certain assets out of bankruptcy so we continue to pay dividends, continue to operate the brands, and continue to do so without the bankruptcy court supervision that would otherwise be --

THE COURT: Indeed, what you just said, that's your principle theme, isn't it?

MR. LAMKEN: That is my principle theme, Your Honor. I think that really sums up the problem here. I think -- and, in addition, I think I should also stress in the end, it can't be both it's all right to put LTL in bankruptcy and then to

extend the injunction to everybody else. By definition, you just end up going way beyond all party -- the parties specified by 362 --

THE COURT: Yeah.

MR. LAMKEN: -- the norm under 105. You understand.

THE COURT: Thank you.

MR. LAMKEN: Thank you, Your Honor. I appreciate that. If there's no further questions, thank you, Your Honor.

THE COURT: No further questions.

I know Mr. Frederick reserved some time.

Mr. Janda, did you have anything further to say?

MR. JANDA: I did not reserve any time, Your Honor. But if you would like to hear from me?

THE COURT: Yeah, I'll give you two minutes. Do you want two minutes? It's your call.

MR. JANDA: Thank you, Your Honor.

Just three points I'd like to make real quick.

So first is, you know, we've heard a lot of talk today about what system, tort system or the MDL system or the bankruptcy system, is better for which set of parties, current claimants, future claimants, defendants.

And I think the point here is just that there's a very complicated admittedly balancing of interests of trying to get claims resolved efficiently, to get claims resolved correctly, to get claims resolved equitably, and to ensure that

people are able to exercise the rights that they have, their constitutional rights, their due process rights, their jury trial rights.

And that complicated balancing of interests has been done by Congress. Congress has enacted a number of different aggregation mechanisms and has enacted the Bankruptcy Code. But the Bankruptcy Code Congress has enacted and provides strong tools to defendants only in a limited set of circumstances as this Court said, those strong tools invite abuse. And it's really up to the courts to police the boundaries of that system to ensure that it's not being used for reasons that Congress didn't intend it be used.

And I don't think 524(g) changes the analysis in any way. 524(g) pre-supposes you have a valid bankruptcy and Congress has determined that 524(g) provides an appropriate tool in bankruptcy once you have a bankruptcy to make sort of the best of a bad situation. But I don't think you can sort of bootstrap your way into bankruptcy to try and take advantage of the tool that pre-supposes the valid bankruptcy in the first place.

Second, just very quickly on financial distress, I heard my friend on the other side say two things that I think together could resolve this case on their own. I mean one is that he says LTL is the appropriate entity and, two, is that in his view or in LTL's view, the total legitimate value of all of

the current and future tort claims against it is less than $61 billion which he has access to under the funding agreement.

You put those two things together and I don't see how you can make any argument that there is a legitimate financial distress here on the part of the debtor that justifies invoking bankruptcy maybe ever and certainly not at this point.

And then, third, just very briefly, you know, as we said, bankruptcy provides a lot of tools. It's a very strong medicine. It curtails creditors' rights in significant ways including allowing debtors to bind non-consenting creditors, possibly many non-consenting creditors to one particular resolution.

And that is appropriate when you have a debtor facing financial distress that needs that time to reorganize its affairs or to pursue an orderly liquidation. But it's not appropriate every time you just have a lot of tort claims against an entity when those pre-conditions aren't met. And that's just the case here.

THE COURT: Thank you very much.

MR. JANDA: Thank you, Your Honor.

THE COURT: Mr. Frederick, I know you reserved three minutes. We'll give you five. Since you're batting clean-up.

MR. FREDERICK: Thank you very much, Your Honors.

I want to start with the trilogy of Third Circuit cases because the main point made on the other side was that

they didn't confront mass torts. But the SGL Carbon case in announcing why the good-faith standard was so important had an extensive discussion of Johns-Manville.

And the point that it was making was that Johns-Manville had tried for many many years to pay off claimants and until it got to a point where it did face imminent financial distress because --

THE COURT: There was no doubt that Johns-Manville was in financial distress.

MR. FREDERICK: And the question here is, is LTL in financial distress.

Now you can either take the fundamental contradiction of their position which is the funding agreement will fund everything in which case LTL is not in financial distress or the funding agreement depends on Johnson & Johnson and JJCI, in which case this is not a proper bankruptcy purpose because those two entities are not in the bankruptcy.

Either way, that contradiction should end the case on as a matter of good faith and the Court need not go further in order to decide how far it needs to go.

Now the point is made that after Ingham, it's impossible to settle these cases. Our expert said 98 percent of asbestos cases settle or dismiss. The bankruptcy law professors who provided an amicus brief on their side said 97 percent of MDL cases settle or dismiss. Common sense tells you

that you don't have to litigate all 38,000 to judgment. We weren't born yesterday. And that point made by the bankruptcy court is on its face not credible and is subject to plenary review by this Court.

Now the main argument that they make for financial distress is based on the speculation that they're going to have to pay out many many tens of billions of dollars. But SGL Carbon says you don't look at speculation for future. You look at what is imminently before you. Do you have a present inability to meet present financial obligations?

And here, LTL unquestionably did that two days after it was created. There's no serious issue at the moment it had filed its bankruptcy it was not facing financial distress. Importantly, Mr. Katyal does not deny that not a dime gets paid until the last appeal of the last objector has been resolved. And we know from judgments and settlements in the civil system that money has flowed.

Johnson & Johnson shouldn't be permitted to stop that process. But the spinoff of JJCI which is permitted, and he acknowledges, under the financing agreement is what creates the cap. As soon as that cap is done, there is no greater value that can be done. And for that reason, their plan is not consistent with the statute 524(g) that says you have to have an evergreen source of continually growing assets and money to pay the future claimants. This plan undisputably does not do

that.

Now he takes me to task for saying that Ingham was paid by Johnson & Johnson. Look at the Appendix Page 6379. It was paid out of a central account. He eventually acknowledges that. The point is Johnson & Johnson charged back to JJCI as an accounting matter.

Now this wouldn't be -- this might be important if JJCI had its own independent shareholders. It is a wholly owned subsidiary of Johnson & Johnson. But Johnson & Johnson wanted to be able to say that it's continuing streak of paying higher dividends year after year has continued, so it fobbed off the accounting deficit to JJCI. I don't know why that should warrant good faith in a bankruptcy.

Now he says that there are real limiting principles here based on the facts. He talks about the latency. That's true for all asbestos cases, not just those that are created out of talc. And it is true of many mass torts, as well. He says there's lottery-style but that's true in any case where there are really good lawyers who know how to try cases and there are really bad lawyers who don't know how to try cases and you have the special problem of specific causation, which is an evident problem and issue in establishing the legitimacy of any person's claim.

Their fundamental problem with their 524(g) is that they don't create an evergreen funding mechanism. And when he

talks about the 79 transfer of liability, he doesn't respond that J&J itself was engaged in reprehensible conduct for which people have found them to be liable.

Now the last point I'd like to make is that Johnson & Johnson did not go to all of this trouble in order to pay claimants more money. They went to this trouble to pay claimants less money more slowly. The civil system is designed with whatever flaws that it has to promptly move along cases and not to stop and stay all action.

This particular bankruptcy is intended to benefit non-debtor affiliates. It is a litigation tactic to stop civil litigation. And there is no increase in value to the creditors, the tort claimants. And for all of those reasons, we urge you to reverse the bankruptcy court.

THE COURT: Thank you very very much.

I would ask that a transcript be prepared of this oral argument and just split the costs half this side, half that side.

And I would also like to thank counsel for extremely well presented arguments not only today but in your briefing and also I should broaden that to thank those who took time to write the amicus briefs, very helpful on both sides. And we'll take the matter under advisement.

Thank you. It's a privilege having you here.

MR. FREDERICK: Thank you.

THE CLERK: All rise. Court is adjourned until tomorrow at 9:30 a.m.

(Proceedings concluded at 2:21 p.m.)

* * * * *

C E R T I F I C A T I O N

We, KAREN WATSON and DIPTI PATEL, court approved transcribers, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of our ability.

/s/ Karen K. Watson
KAREN K. WATSON, CET-1039

/s/ Dipti Patel
DIPTI PATEL, CET-997

J&J COURT TRANSCRIBERS, INC. DATE: September 30, 2022

EXHIBIT 3

In the Matter Of:

IN RE LTL Management LLC Bankruptcy

JOHN KIM

April 14, 2023

Deane.

(Whereupon, exhibit is received and marked Kim Deposition Exhibit 4 for identification.)

MR. JONAS: Kim Number 4. Oh, what's this one?

MR. BENSON: I gave you two. She takes two. She keeps one.

MR. JONAS: Oh, she takes two. See, I didn't know that. Thank you.

THE REPORTER: Kim 4 for identification.

THE WITNESS: Thank you.

BY MR. JONAS:

Q. Okay. Mr. Kim, again, we'll be quick about this. This is the declaration of John Kim in support of the first day pleadings that was filed in the first bankruptcy. It's dated October 14th, '21. I just have a few questions.

A. Mm-hmm.

Q. I want to turn to page 9 of the document at the bottom and it's paragraph 26. And you said "As I mentioned above, the" --

A. I'm sorry --

Q. Sure, take your time.
A. Twenty-six?
Q. Page 9.
A. Got it.
Q. And paragraph 26. It says "As I mentioned above" -- and the "I" is you, right?
A. Mm-hmm, yes.
Q. "As I mentioned above, the design of the 2021 corporate restructuring ensures that the debtor has at least the same, if not greater, ability to fund talc-related claims and other liabilities as Old J -- JJCI had before the restructuring."
Do you see that?
A. I do see that.
Q. And is that true today?
A. I'm sorry, is --
Q. Is it true today that the debtor, LTL, has at least the same, if not greater, ability to fund talc-related claims and other liabilities as Old JJCI had before the prior restructuring?
A. I believe it is.
Q. So you think today that -- well, strike that.
What is the basis of your belief that

the debtor today has at least the same, if not greater, ability to fund talc-related claims and other liabilities as Old JJCI had before the prior restructuring?

A. So what I would say is that the -- after the funding agreement was restructured with the new funding agreement and the support agreement of J & J, which I'm sure you'll -- you'll get to later, it currently has the same ability to fund the talc-related liabilities which, again, I think we are -- you know, we are able to -- to meet that liability in the same way as we did prior to the restructuring.

Q. Well, let me ask you about that.

Isn't it the case that under -- that Old JJCI had up to roughly $61 billion of -- of ability to fund claims?

A. I --

MS. BROWN: I -- I object.

Misstates the evidence.

A. Yeah, I --

Q. Okay. I'm -- okay. Strike that. Fair enough. Let me -- let me rephrase.

What was the -- what was Old JJC's -- JJCI's ability to fund talc-related claims

and other liabilities before the last restructuring?

A. We didn't calculate that.

Q. Oh, okay. We're going to do this again?

A. Well, we can cut to the -- cut to the chase. You know, if you're -- the -- the -- I think you referenced some $60 billion number. That's the fair market value of the assets of JJCI. That's not its ability to fund liability. You have to take into account it's operation -- operating business --

Q. Hold on.

MR. JONAS: Could somebody -- could we just have folks mute who -- who are listening in, please? Thank you.

Q. Go ahead. Sorry.

A. It's an operating business. And that's just what -- you know, you have to look at, you know, what -- so $60 billion is not a way to look at how much you can use to fund because that would -- that would just decimate the business if you had to spend $61 billion.

Secondly, we don't think that the

liability is that great. And what we think is that the liability of the -- you know, of the -- the talc liability, we could have met it with the JJCI. You know, we were not insolvent.

The same is true with LTL after the -- the revisions to the funding agreement and the, you know, support agreement. It's not insolvent, but it would be, you know, in financial distress.

Q. Okay. I -- I get it, but what I want to -- I don't want talk about the liabilities for a second.

A. Mm-hmm.

Q. So let's just focus on the asset -- the -- the asset side.

What was the total amount of value that could have -- that would have -- strike that -- that could have been available to LTL under Funding Agreement One?

A. I think it was the fair -- it was the fair market value of the assets which would have been around $60 billion.

Q. Okay. And today under Funding Agreement Two, what is the total value that's available to LTL under Funding Agreement Two?

A. The total assets available? Well, I

mean, one way to look at it would be the fund -- the fair market value of Holdco, which has the principal responsibility, is, I would say, I think around 30 -- $30 billion. But, of course, there's liquidity issues with that $30 billion, but it is $30 billion.

And but, also, there is a -- a proposal on the table to take care of all the talc liability that J & J would fund for 8. -- $8.9 billion which has the support of law firms representing 60,000 claimants. So I would say that's really an appropriate number.

Q. Yeah. Okay. I don't -- I don't want to talk about the claims for now. I'm a simple person. I just want to focus on --

A. Mm-hmm.

Q. -- the value that's available to LTL under the funding agreement. Just -- you told me -- I just want to make sure I understand -- the value available to LTL under Funding Agreement One was roughly $60-odd billion, correct?

A. That's correct.

Q. Okay. And the value available to LTL under Funding Agreement Two is roughly $30 billion?

MS. BROWN: Objection; misstates the evidence.

A. Yeah, $30 billion with all the caveats.

Q. What -- what -- I'm just looking at assets not -- and value, not settlements and claims.

What -- what caveats are there?

A. The caveat would be the $30 billion is something that -- it's an internal evaluation that was done for other purposes. I'm not actually intimately involved. I wasn't intimately involved. I wasn't involved at all in getting that value, but that's -- that's my understanding of -- of what that number represents.

Q. Okay. So just using -- and I appreciate that. But just using the two values that we have as best available to us, 60 billion and 30 billion, right? Funding Agreement One was 60; Funding Agreement Two was 30?

A. But then you're ignoring the support agreement which J & J is going to support a plan for $8.9 billion that has -- again, that would take care of all the liability and has the support of law firms that represent 60,000 plaintiffs. So that -- you have to take that into account as well

what is available to LTL under the funding agreement, the -- the new funding agreement, to satisfy talc claims and other obligations?

A. That would be whatever -- it would be the -- the Holdco funding arrangements.

Q. Okay. So that's -- and you think the value of Holdco is roughly -- again, I know --

A. No.

Q. I'm not holding you to it. I know you -- is roughly $30 billion.

A. Well, that's the -- that's the current fair market value of the assets of Holdco. What Holdco will be doing in the future, you know, if the -- you know, if -- under this hypothetical, if the, you know -- if bankruptcy gets dismissed, yeah, I don't know that I can answer what that -- what that number is going to be.

Q. Oh, it might be less than $30 billion?

A. Could be more.

Q. Could be more? How could it be more?

A. Holdco could -- could increase in value.

Q. Oh, okay.

And under Funding Agreement One, if it was still in existence and if you were outside of bankruptcy, what value under Funding Agreement One

discussed this with have indicated that they believe that the Third Circuit -- the Third Circuit was wrong and that it should have been reheard.

Q. What law firms have you discussed this with?

MS. BROWN: Well, I -- yeah, I don't want you to get into any --

THE WITNESS: I know, yeah.

MS. BROWN: You can identify counsel that you have, but beyond that you should not discuss the specifics of discussions about the Third Circuit decision.

BY MR. JONAS:

Q. I'm not -- I'm certainly not asking for specifics of discussions. I just -- you said you've discussed the Third -- in connection with everyone agreeing that the Third Circuit was wrong.

A. Yeah --

Q. Let me finish, please. Let me finish, please.

You said that you discussed that with law firms. I just want to know which law firms

Q. Okay. And as of the date of its formation, LTL had access to the funding agreement outside of the bankruptcy even before LTL filed for bankruptcy on October 14th, 2021, correct?

A. Yes. For that period of time before filing, it had access to the funding agreement.

Q. Okay. And then do you recall, sir, that -- it was either the day before or a couple days before LTL filed for bankruptcy in October 14th, 2021. Do you remember there was a board meeting to discuss options including whether to file for bankruptcy?

A. I do recall that.

Q. Okay. And -- and we've looked at the minutes of that meeting before, correct?

A. In the prior proceeding, we did, yes.

Q. Okay. And what you explained to us, and what the meetings reflect, was that various options were presented to the LTL board and ultimately you made a recommendation that bankruptcy be filed and the board did decide to file for bankruptcy which was filed on October 14th, 2021, correct?

A. I believe that's true. I -- I don't have the -- the filing in front of me for the

securities litigation, and there's the runaway verdict issue.

So, you know, your time frame of -- I think -- I think what you're really getting at is the immanency. I -- I would say that we are in imminent financial distress if we get dismissed.

Q. If you get dismissed and other things happen, then there's a possibility --

A. No.

Q. -- that LTL might not be able to meet its obligations. Is that fair?

A. No. I would say we are in imminent financial distress.

Q. Okay. So what is the imminent -- what is the factual basis for the imminent financial distress of LTL given the fact that it's backed by Holdco which has a market value of somewhere around $30 billion and LTL's own considerable entity?

MS. BROWN: And, again, I'll caution you. Just reveal factual information not legal advice.

A. So I would rely on the testimony from the last proceeding that -- where the court found that we were in financial distress just based --

based upon when -- when it was -- when we had New JJCI funding agreement.

Q. All right.

A. It's the same -- the same -- the same basis.

And, in fact, I think our liabilities probably have increased since then because of the -- you know, the -- the -- the passage of time. And so I think based upon all -- all the factors that were in the prior proceeding would be applicable to the current proceeding.

Q. Okay. Mr. Kim, the court that you just referred to in that answer is the bankruptcy court, Judge Kaplan, correct?

A. That is.

Q. Okay. Great.

Different questions.

Johnson & Johnson never formally rescinded the funding agreement prior to its rescission and agreement with LTL, correct?

MS. BROWN: Objection; vague.

I don't understand the question.

Q. All right. Let me try it a different way.

Did Johnson & Johnson ever refuse to pay

MR. RUCKDESCHEL: Okay. No further questions from me.

CROSS-EXAMINATION

BY MR. THOMPSON:

Q. Hello, Mr. Kim. Clay Thompson with Maune Raichle on behalf of Katherine Tollefson.

Can you hear me okay?

A. I can, Mr. Thompson.

Q. Okay. Just following up on Mr. Ruckdeschel's comments, are you saying that outside of legal conversations with lawyers, you never were told by anyone at Johnson & Johnson that Johnson & Johnson was refusing to honor the funding agreement?

A. Outside of any conversations I may have had, I -- yeah, I don't have any information about that.

Q. What I'm saying is that no one came to you -- you never went to Johnson & Johnson with no lawyers involved and they refused to honor the funding agreement in your capacity as the LTL Management chief legal officer, is that right?

A. I've -- I've never approached anyone at Johnson & Johnson about that, no.

Q. And no one --

A. Other than --

(Unintelligible cross talk; reporter requests one speaker.)

A. I'm sorry. I'm sorry. Other than through lawyers.

Q. Understood.

And -- and no one at Johnson & Johnson told you, outside of communications with lawyers that there's some assertion of potential privilege for, no one at Johnson & Johnson ever told you that they refused to honor the funding agreement to LTL Management of which you are the chief legal officer, is that right?

MS. BROWN: Objection; asked and answered.

You can --

A. Other than through -- through discussions with lawyers.

Q. Understood. Okay.

The purpose of LTL Management LLC, which was formed in 2021, is to coordinate a mass settlement of both LTL's talc liability and Johnson & Johnson's talc liability in a bankruptcy. Is that fair?

MS. BROWN: Objection to the

EXHIBIT 4

Transcription of File:

American Bankruptcy Annual Spring Meeting

Texas Two Step

Runtime: 01:02:02

MR. GLEIT: Yeah, now you do. 00:10

MS. TSIOURIS: Okay. Good morning, everyone. 00:11

It's 10:01. We'll just give it another minute for 00:15

people to find their seats, and then we'll -- we'll 00:16

get started. Just have some people in the back. 00:20

All right. So good morning, everyone. Welcome to 00:43

the panel on the Texas Two Step. 00:46

As I'm sure you saw in the materials, we really 00:49

have three stated objectives for the panel. One is 00:52

to go over and describe just the basics of what the 00:56

Texas Two Step is in a divisive merger. Two, to 00:59

give a little bit of an overview of the current LTL 01:03

case and what is going on there. And three, to have 01:06

a healthy debate about the pros and cons of the Texas 01:10

Two Step and maybe get a little bit into policy 01:13

considerations around the Texas Two Step. 01:18

So, and then of course, our -- our unstated 01:19

objective is to have a little bit -- a little bit of 01:21

fun here. 01:22

So, before we get into the panel, I just want to 01:27

have my colleagues introduce themselves and maybe also 01:31

just give a quick background and maybe any connection 01:34

that you have to a Texas Two Step case. So, Jeffrey, 01:38

maybe if I can start with you. 01:39

MR. GLEIT: Okay, sure. I'm Jeff Gleit. I'm a 01:43

partner at ArentFox, and I came across the Texas Two Step basically following the Change A through the press and, you know, my thoughts on it have evolved over the past few months. And, you know, we're evaluating it, you know, for one or two companies including a nonprofit, so I'm looking forward to hearing Greg's thoughts and Judge Jones' thoughts, and Brya's thoughts on it. And that's who I am. 01:49 01:50 01:54 01:57 01:58 02:01 02:04 02:08

MS. TSIOURIS: Thanks, Jeff. Brya? 02:10

MS. KIELSON: Yes. Hi, I'm Brya Kielson. I'm a partner at Morris James in Wilmington, Delaware. My background is prior to joining Morris James I was at the U.S. Trustee's office in Delaware, so I have an interesting perspective, and I kind of struggle with the perspective that I had there versus in practice. 02:12 02:15 02:18 02:21 02:23 02:27 02:27

I don't have any cases also involving the Texas Two Step, so it's academic for me for now, and definitely an interesting issue. 02:31 02:35 02:36

MS. TSIOURIS: Thanks, Brya. Your Honor, Judge Jones. 02:38 02:39

JUDGE JONES: Good morning, everyone. I am Judge Jones. I am the chief bankruptcy judge in the Southern District of Texas. It is a pleasure to be here and speak with you all this morning, and I do 02:41 02:43 02:46 02:49

hope that what we have is a conversation. 02:52

I grew up with this statute as a practitioner, 02:56

and I hope that you will take advantage of the panel 03:00

that we have here this morning and ask questions. 03:02

Remember, the only bad question is one that you don't 03:05

ask. In terms of connections, you know, there are no 03:09

Texas Two Step cases in Texas, and we can -- we can 03:14

certainly talk about that as well. 03:16

MS. TSIOURIS: Thank you. Greg? 03:18

MR. GORDON: I am Greg Gordon, a partner with 03:20

Jones Day. I am a long-time bankruptcy and 03:26

restructuring lawyer probably longer than I would like 03:31

to think about. 03:32

But I'm involved in I think probably all the 03:38

divisional merger cases that are pending at the 03:40

moment starting with the Bestwall Chapter 11 Case, 03:46

an affiliate of Georgia Pacific that we filed in 03:48

November of 2017 through to the LTL case that we 03:53

filed in October of last year. That's the affiliate 03:58

of J&J as you probably know. 03:59

And I, of course, think the divisional merger 04:02

is the greatest innovation in the history of 04:04

bankruptcy, and we'll talk about that more today. 04:07

MS. TSIOURIS: Thank you, Greg. So, and -- and 04:10

I'm Natasha Tsiouris. I'm a partner in the 04:13

restructuring group at Davis Polk. 04:15

Recently, my touchpoint not necessarily with the Texas Two Step, but I've had a case where we utilized the Texas Divisive State Merger in a case called Fieldwood where we used it to get the company out of bankruptcy, so that is -- that's my touchpoint with the Texas Two Step. 04:18 04:21 04:26 04:30 04:32 04:34

Just a bit of housekeeping admin. As Judge Jones said, you know, feel free to ask questions during the panel. We also have up here I think comments that we're getting I think virtually for folks who are dialed in by Zoom, but I think also you can send in questions and we'll do our best and I'll do my best to keep my eye on this and incorporate those questions in the panel as we get going. So, feel free to interrupt us at any time with questions and keep it a healthy back and forth. 04:38 04:41 04:47 04:50 04:52 04:55 04:58 05:01 05:04 05:04

So, just to kick us off, sort of just going through what is -- who would like to describe what is the Texas Two Step and what is the Divisive State Merger? 05:10 05:13 05:17 05:18

JUDGE JONES: Greg, why don't you start? If you get it wrong, I am right here watching (inaudible) watching. 05:21 05:22 05:23

MR. GORDON: I'll -- I'll try to remember what 05:25

it's about. So, the -- it's interesting, because the Texas Divisional Merger Statue's actually been on the books for a long time. I think it dates back to 1989. It's not a statute, however, even though I practice in Texas that I was aware of until 2016 when we were starting to look at ways to potentially proceed with a corporate restructuring for Georgia Pacific prior to a bankruptcy filing.

But in its essence, it's a statute that basically permits a -- acompany to divide. To me, it's a bit of an oxymoron to say it's a -- it's a divisive merger. That doesn't seem right to me, but it literally allows a company to divide and allows it to basically -- it provides full flexibility for the company to allocate assets and liabilities any way it wants. And --

JUDGE JONES: Greg, let me ask you. I mean, that -- that -- that concept's been around for hundreds of years. Why -- why -- why do you need a statute to do what can already be done?

MR. GORDON: Well, because this statute allows it to be -- allows this allocation of assets and liabilities to be done in a way that's much simpler. It's done by operation of law. As a result, you don't have to worry about consent to assignment

issues and contracts. They're not deemed to be any any transfers for contractual purposes. 06:47 06:50

It's sort of been blown out of proportion in the sense that people look at it and say this is brand new. This allows companies to do things they could never do before. That's really not true. Companies could do these types of things before. I mean, you could spin out assets, move assets otherwise, have intercompany transfers. It was just a lot more complicated, and this allowed it to be done in a way where literally you had full flexibility to make the assignments, allocate liabilities where you wanted, split your assets the way you wanted. 06:54 06:56 06:59 07:01 07:05 07:07 07:10 07:13 07:15 07:18 07:20

And the important thing is that once that transaction occurred, you -- you would have two new entities each responsible for their own liabilities. There's no secondary liability, and then the original company disappears. It's gone. You've created two new companies. 07:23 07:25 07:28 07:31 07:34 07:35

JUDGE JONES: So, Greg, what happens if you forget something? Because we all make mistakes, right? What -- what happens if you forget a liability or you forget an asset? What happens under the statute? 07:37 07:39 07:42 07:45 07:45

GORDON: Well, first of all, I would -- first of 07:47

all, I would say that at Jones Day we don't make mistakes. 07:49 07:50

JUDGE JONES: Never makes a mistake. Absolutely. 07:51

MR. GORDON: That's a question I don't have an answer to, because as far as I know, we've never forgotten anything. 07:54 07:56 07:57

JUDGE JONES: Got it. So, I actually think the statute addressed that. I -- I just assumed you would know that. 07:58 08:02 08:02

MR. GORDON: Well, I'm -- 08:01

JUDGE JONES: But actually -- 08:03

MR. GORDON: I'm sorry to disappoint you. 08:05

JUDGE JONES: But I actually think there's an allocation mechanism in the statute for either unidentified or either assets or liabilities that splits between the new entities. 08:06 08:09 08:14 08:17

MS. TSIOURIS: Yeah. I think -- I think it'll go pro rata to the surviving entities, right? And -- 08:20 08:22

JUDGE JONES: Pro rata based on what? 08:25

MS. TSIOURIS: That is a little confusing in the statute to me to be honest, but it's pro rata I think to the surviving entities and it splits the assets and liabilities that way. But I -- I don't pro rata based on what to be honest. 08:26 08:29 08:33 08:35 08:37

JUDGE JONES: Hmm. 08:37

MS. TSIOURIS: I don't know if -- 08:38

MR. GLEIT: I -- yeah. Actually, I don't know -- 08:39

MS. TSIOURIS: -- (inaudible). Something -- 08:41

MR. GLEIT: Your Honor, do you know? 08:43

JUDGE JONES: My memory of it, and I often get the Delaware Statute mixed -- mixed up with the Texas. I know that they both have provisions. I think one of them was -- one of them was just simply a -- just simply a split and I think the other one was based upon allocated value. 08:46 08:48 08:51 08:55 08:57 08:58

MR. GLEIT: Okay. 08:59

JUDGE JONES: But I -- I may be wrong about that. 09:03

MS. TSIOURIS: So, this is a -- a little bit of a set-up question for our panelists because the legislative history. And -- and Greg did touch on this. But just curious why, you know, if folks on the panel want to venture what sort of the original purpose of the Texas State Law was, and -- and why it was enacted this way? 09:05 09:07 09:10 09:14 09:16 09:19 09:22

MR. GLEIT: I'll start which is -- my belief is and what I read from the legislative history and, you know, from what I've seen in practice, it just it makes it a -- a faster, easier way to -- to -- to do a spinoff. And -- and as Greg touched upon, instead of getting consents and certain permissions 09:25 09:27 09:30 09:34 09:37 09:39

that you might need if you were not relying under the statute, it -- it's a more cost-effective means of effectuating a spin-off or a split of two companies. And then earlier also, Judge Jones had mentioned when we were preparing that there's even like a tax benefit so you don't have to do a stamp -- pay a stamp tax I believe. 09:41 09:46 09:49 09:52 09:56 09:57 09:58

JUDGE JONES: Yeah, in the old days there -- there were certain types of asset transfers for which there was a tax obligation, and it was my understanding that when they did that, they wanted to make it totally neutral which is why you see the no transfer provision in that statute as well as giving the ability to deal with your lenders and -- and other outstanding contracts. 10:00 10:02 10:05 10:08 10:11 10:15 10:18 10:20

MR. GLEIT: Yeah. And I would just say more generally, Texas has tried for a long time to be a very business-friendly state, and this was legislation consistent with that objective. The idea was just to basically make it easier for companies to do the types of things that companies were already doing but in a manner that was much simpler and more straightforward. 10:22 10:25 10:28 10:31 10:32 10:35 10:37 10:40

JUDGE JONES: But I do want to pose a question as we think through this. You've got that very simple 10:43 10:45

provision that in the statute that just says that there's not a transfer. And there's been an awful lot of discussion and an awful lot written about that. But I want to pose the question, you know, who genuinely believes that a state can define a transfer for purposes of Federal fraudulent transfer law? 10:49 10:52 10:54 10:58 11:02 11:06

Yeah, I -- you know, I don't think that that's possible but I've certainly read an awful lot about it and I've certainly heard it argued an awful lot. But I -- I just find that interesting. Anybody have thoughts about that? 11:10 11:12 11:16 11:19 11:20

MS. KIELSON: Well, what -- 11:21

JUDGE JONES: I'm totally going off -- unfair (inaudible). I do not take -- 11:22 11:23

MS. KIELSON: So, what do you think -- 11:24

JUDGE JONES: -- instructions very well, so it's -- I'm totally off script here. 11:25 11:27

MS. KIELSON: What do you think then of them including that language, or -- 11:28 11:31

JUDGE JONES: Well, I think it was really done to deal with the fact that let me think about it. If you had to get consents from 29 different lenders because -- or you had to do on-sale clauses or any of that. 11:32 11:35 11:38 11:40 11:41

MS. KIELSON: Mm-hmm. 11:41

JUDGE JONES: And again, sort of the tax angle that back in 1989 existed with respect to some asset transfers. 11:42 11:47 11:47

JUDGE JONES: So, basically, it's a non-issue beyond -- you're saying it's a non-issue beyond that (inaudible). 11:50 11:52 11:52

JUDGE JONES: That's Jones' opinion. I'm -- I'm sure other folks have -- have different views on that. 11:53 11:56

MR. GORDON: Well, my -- my -- my read of it is that it wasn't -- they -- they weren't saying it's not a transfer for fraudulent transfer purposes. I think it was for the more limited purpose of allowing these transactions to take place. And the reason I conclude that is because they made clear that the divisional mergers remain subject to state fraudulent transfer law, and it seemed to me -- I don't know, in my mind it seems inconsistent to suggest that they were saying there's no transfer which would potentially undermine the fact that -- -- that the -- at the same time they were saying these transactions can be and should be tested by fraudulent transfer law. 11:58 12:01 12:02 12:05 12:08 12:11 12:13 12:17 12:19 12:20 12:24 12:25 12:29 12:31

JUDGE JONES: I'm learning just from -- from a bankruptcy perspective, if you could have 50 different views of what constituted a transfer, I mean, that 12:32 12:35 12:38

would be -- that would just be borderline ridiculous. I mean, I think a transfer for purposes of 548, it's federal law. I got the 544 analysis, totally understand that, I -- I would -- I could see that argument. But for 548 I just -- I just can't imagine that a particular state can define what constitutes a transfer under 548.

MR. GORDON: Yeah. And I -- I'm not disagreeing with 13:02 you. I'm just saying it wouldn't have occurred to me to argue in a 548 case that there's no basis for it because the Texas statute says it's not a transfer.

MR. GLEIT: Yeah. And I actually -- I believe the legislative history, and I think one of the authors of the statute even said Crittenden rights are preserved and it's not an intent to -- to eliminate them, so --

MS. TSIOURIS: Yeah. So, I want to -- I want to go there next because obviously, I mean, just going over the purpose of the statute I think it -- you know, it seems pretty clear that there was a good, sound reason and a good justification for putting in place the divisive merger concept into the Texas statute, and we've even seen obviously other states follow suit. There's similar divisive merger statutes

in California, Pennsylvania, Arizona, Delaware now. 13:51

So, I think legislatures are seeing the -- the 13:55

purpose and that, you know, there is some reason to 13:57

put it in place. But obviously, not everybody agrees 13:59

with that, and people are challenging some of these 14:03

Texas Two Step cases and the purpose of the divisive 14:06

state merger. 14:07

So, just moving to that a little bit and getting 14:09

to these questions about what is a transfer? How can 14:11

these be attacked? Maybe Greg could just sort of 14:14

kick, it off. If you can describe how the Texas Two 14:17

Step was used in the recent LTL matter, and then we 14:22

can kind of take it -- take it from there. 14:24

MR. GORDON: Sure. So, many of you may know 14:27

this, but the idea actually emanated from the -- as I 14:31

said earlier, the Bestwall case where Georgia Pacific 14:36

decided to move forward with this strategy, and then 14:40

it went through two other cases in Charlotte. We've 14:44

filed three cases there, and then we put it in place 14:51

for LTL. 14:52

But, you know, the LTL situation of all of them 14:56

in some -- some respects was the worst -- sorry -- in 15:00

some respects was the worst from the standpoint of 15:02

for many years I've been involved with companies with 15:07

asbestos liability. And -- and those liabilities are 15:09

very difficult for companies to deal with because of the thousands of claims they would get every year. And just the inability, frankly, to defend themselves and ended up settling those cases just to save defense costs was literally impossible to litigate the cases. But at least with asbestos, you had a situation where it was recognized that asbestos was a dangerous product.

Now for a lot of the companies, they had very strong defenses in the sense that, well, asbestos per se might be dangerous but it's a matter of sufficient exposure, and -- and our products were encapsulated or there are other reasons why the exposure should have been far more limited than what they were seeing in terms of the litigation.

But when J&J came to us, I mean, their situation was far worse from the perspective of both the company and the claimants because in only about five years they had ramped up from virtually zero cases, and these are cases based on an argument that Johnson's Baby Powder causes disease. From literally nothing to they had almost 40,000 cases pending at the time of the filing. And that -- that's just an unbelievable scenario to me.

And their costs went up correspondingly. I mean,

they -- they went from virtually nothing in cost to paying about four and a half billion dollars in that five -- five-year period, about a billion of which was defense costs. And they were actually to the point of incurring about 10,000 new claims a year. They had 12,500 I think just in the first part of 2021 alone. 16:32 16:37 16:40 16:42 16:46 16:49 16:51

So, from the company's perspective, completely unmanageable. How do you litigate 40,000 cases? How do you deal with the fact you're getting 10,000 more per year and they're anticipated to continue for the next 50 years? What do you do about that as a company no matter how big you are? 16:54 16:57 16:59 17:01 17:04 17:07

But then look at it from the standpoint of the claimants. It was awful from their perspective too because it was literally -- and this gets reported in the press, but I think it's true, it was literally like a lottery for the claimants. The large majority of the claimants lost, and they lost on science issues based on the fact that the juries just didn't believe that the product caused disease, either ovarian cancer or mesothelioma, or they would win and then the case would get reversed on appeal. 17:09 17:12 17:14 17:17 17:20 17:23 17:26 17:29 17:34 17:37

So, the large majority of these claimants who were actually moving forward weren't getting anything. 17:38 17:42

And then periodically there would be these gigantic, gigantic verdicts. 17:45 17:47

One verdict was four and a half billion dollars for 22 people. There were several verdicts of hundreds of millions of dollars. And so, if you put it like on a -- on a graph, you would just see it was just this ridiculous thing. There was just a few dots up into the billions or hundreds of millions, and then all the other ones would be along the bottom at zero. 17:49 17:53 17:57 17:59 18:02 18:06 18:08

JUDGE JONES: So, was the company self-funded on all of these claims? 18:10 18:12

MR. GORDON: Largely, yes. 18:13

JUDGE JONES: What does that mean, yes? 18:14

MR. GORDON: Well, I mean, they had a -- they had a self-insuring. They had their own insurance entity and they had some insurance. 18:16 18:19 18:21

JUDGE JONES: Does -- okay. 18:22

MR. GORDON: But in any event, it was, you know, very untenable for the company and not working well for the claimants. 18:24 18:27 18:29

And so, we talked to them about this strategy, and they wanted to do it in a way -- and all these companies to their credit wanted to -- to -- to file bankruptcy in a way where they could not subject the entirety of their enterprise to the filing. But at 18:33 18:38 18:41 18:44 18:48

the same time, they didn't want to be criticized for having harmed the claimants in any way. 18:50 18:53

So, in all of these cases including J&J, the divisional merger was done in a way where the liability was allocated to the entity that filed. So, in the J&J case, it was the talc liability. There were operating assets put into that entity although they were put into a subsidiary. 18:56 18:58 19:02 19:06 19:09 19:11

But the most important thing is, and it's often overlooked in the press, is that there was a funding agreement that was put in place between the entities that it split. It's a little more complicated than this. I'm simplifying. But the entity that received the the larger segment of the assets agreed to provide funding unlimited, you you know, basically, capped only by its ability to pay to back step -- back stop the obligation of the entity that filed to pay the claims. 19:13 19:16 19:19 19:21 19:24 19:27 19:30 19:33 19:37 19:39

And the idea was, and these companies all felt the same way, was we don't even want to have an argument. We -- we would like to avoid an argument that there was any kind of fraudulent transfer here. So, we're not interested in putting a cap on the funding agreement. We're not interested on just allocating certain assets and putting all the other 19:41 19:45 19:47 19:48 19:54 19:55 19:57

ones there and not having a funding agreement. We'd like to do it in a way where we can say to the claimants and say to court, look, the same assets that were available before the Chapter 11 to support the payment of these claims are available post the Chapter 11. 20:00 20:02 20:05 20:09 20:12 20:13

JUDGE JONES: How -- how has that worked out for you so far? 20:14 20:15

MR. GORDON: That's not worked out too well. That's not worked out too well. 20:15 20:18

JUDGE JONES: I do have a question. So, when you're making -- when you're making that decision as to the allocation, why it is important that the company that has the perspective tort liability also have operating assets? Why wouldn't you just -- why wouldn't you just dump a bunch of cash in there and say there you go? 20:20 20:22 20:25 20:30 20:33 20:36 20:38

MR. GORDON: Well, from our -- you know, we've always felt -- you know, we've tried to look forward into these cases and think through what do you need to have? What position do you need to be in order to ultimately confirm a plan? And it's been our view for a long time that you have to have an operation. You -- you need to have something to reorganize at the end of the day. 20:39 20:40 20:45 20:47 20:50 20:52 20:55 20:56

And you may be aware of the fact that in some of the earlier asbestos cases, companies actually had to to literally buy a business or bring in an operating business in order to meet the requirements under the code to confirm a plan. So, we just did that all from the beginning. We -- we just said to these companies, look, it makes sense to put in an operating business, something that we can reorganize around at the end of the day. 20:58 21:02 21:05 21:07 21:11 21:13 21:15 21:19 21:20

MS. KIELSON: So, is the potential recovery then if the funding is unlimited, the potential recovery would be the same as if the entire J&J went in? Is that (crosstalk) now? 21:21 21:25 21:29 21:30

MR. GORDON: Well, no. See, that's another important point I should make. The -- the plaintiff's bar likes to argue about J&J, the ultimate parent, and they like to talk about the net worth of the ultimate parent. But what they ignore is that the -- the entity that filed is the product of a split of an indirect subsidiary of J&J which is where the liability actually sat. 21:31 21:35 21:38 21:40 21:44 21:48 21:53 21:55

Now, it's also a very large company called Johnson and Johnson Consumer, Inc., but that's the entity that split. The entirety of its assets remain available. But the other thing that was done in 21:57 22:00 22:04 22:07

J&J which it wasn't done in any of the other cases, J&J itself agreed to become a co-obligor on the funding agreement to the extent of the value of that indirect subsidiary we refer to as JJCI. And that was just to provide further comfort that assets -- the assets would be available. 22:09 22:14 22:17 22:23 22:26 22:28

Because one of the criticisms we've had from the plaintiff's bar in the other cases is well, there's nothing to stop the entity that didn't file from dividending all its assets away. And so, we said okay, well we're -- we're gonna solve that problem by having the ultimate parent actually be a co-obligor. So, if you're worried about assets being dividended up, the ultimate parent is also there and agreeing to be a co-obligor to the extend of the value of that entity. 22:30 22:32 22:36 22:38 22:41 22:44 22:48 22:51 22:53 22:56

MS. TSIOURIS: So, I just want to unpack a little bit for the audience for folks who aren't as familiar with these cases, because you may be hearing from us. At least I think that's the way the panelists are going which is the statute provides for a very sort of orderly separation of assets between two or more entities that would otherwise be allowed. It just sort of provides more for a short-cut and allowing it to be done by statute and through a 22:58 23:01 23:02 23:06 23:10 23:14 23:18 23:21 23:21

single plan of merger as opposed to multiple conveyances and contractual agreements. 23:26 23:28

So, that is a concept that sort of already existed. What was novel and unprecedented there was just really sort of making it one single much easier sort of contractual process in terms of doing it through a plan of merger. Too, you're hearing in the J&J case that there was there was this funding agreement that was put in place to fund all the claims, not to leave behind an insolvent entity. So, you might be thinking sort of well, what's, what's the issue here? What is the big sort of hullabalu? What are people raising in the J&J case? 23:30 23:33 23:39 23:41 23:44 23:46 23:50 23:53 23:56 23:59 24:03

And I think that there is really sort of two issues that people are bringing up with the Texas Two Step, that one, it is a fraudulent conveyance still, so I want to get people's thoughts. And we've talked a little bit about the transfer issue. Get panelist's thoughts on what -- how strong of an argument is it when you're hearing that there is a funding agreement? How strong of an argument is it that it's a fraudulent transfer, one? And two, is it really more just a case of bad faith that you're abusing the bankruptcy system in some way, and something here is untoward, and you are supplanting other systems that exist for dealing 24:05 24:08 24:13 24:15 24:18 24:22 24:23 24:27 24:30 24:34 24:37 24:41

with these types of claims with the bankruptcy code and this shouldn't be allowed? 24:44 24:46

So, I want to take those in turn. One, on the fraudulent conveyance arguments. Brya or Jeff, do you want to kind of give thoughts on -- on how strong those are, and then we'll turn to the bad faith arguments people are raising? 24:49 24:53 24:55 24:58 25:00

MR. GLEIT: Yes, no. I'm happy. Is it all right if I start? 25:02 25:02

MS. KIELSON: No, yeah -- yeah, go. 25:03

MR. GLEIT: Yeah oh. So, when I first looked at the issue, and I'm ready for Judge Jones to come at me now with -- with a question or two. You know, to me it appeared like it would be an obvious fraudulent conveyance unless the funding agreement really is, you know, backs it up and provides sufficient value to -- to turn it into a viable transaction. Earlier today, we were talking about whether that's the right vehicle to -- to file a fraudulent conveyance complaint, you know, who the defendant would be. 25:06 25:10 25:14 25:17 25:19 25:22 25:26 25:30 25:33 25:35 25:36

I would take the position that you would sue J&J and try to unwind the transaction. Others on this panel think that that's not the right way to go about it. But in my mind, what -- what -- when you first 25:38 25:41 25:44 25:50

look at the Texas Two Step and you look at J&J, you say hey, this is problematic. It's really trying to force all these claimants into a bankruptcy court where they don't want to be. 25:54 25:56 25:59 26:01

And then when you dive deeper into it and really start looking at it, it's really more of a forum of -- a forum for like negotiation, right? So, you -- you argue bad faith. You argue fraudulent conveyance. And it's really just coming down to what we all deal with on a daily basis. It's money, right? We -- we are bankruptcy lawyers. We split up a pie. 26:04 26:07 26:10 26:12 26:15 26:18 26:19

And -- and it -- it enables a company to -- to deal with the fraudulent conveyance issue because you -- you then value the, you know, the -- the amount of claims at issue. You see whether J&J can back it up. And assuming they can, you know, I don't believe it would be a fraudulent conveyance. And if they can't, I would file a complaint which Judge Jones might dismiss because I didn't name the right defendant, but I would name Johnson and Johnson and try to unwind the transaction. 26:23 26:26 26:29 26:33 26:35 26:38 26:40 26:44 26:47 26:48

JUDGE JONES: So, we -- we were having a little bit of fun before -- before the -- before the presentation. And so, I -- I -- I said tell me -- tell me who the plaintiff is. Tell me who the 26:50 26:53 26:56 26:58

defendants are. Tell me what the transfer is that you're seeking to avoid. Because I've never heard a really good start to finish answer to that question. And in all fairness, I will tell you Jones' personal view. I think it's absolutely the wrong claim. 27:01 27:05 27:08 27:11 27:14 27:16

I think it's where all of the discussion is right now. I think that there is a much scarier claim out there that I'm waiting to see brought. And someone's gonna say, well what it is, and I'm gonna tell you that that's the one question I won't answer today because then it becomes, well Jones said. And that's I get in trouble for that all the time. 27:17 27:21 27:24 27:27 27:28 27:31 27:34

But I -- I actually do think that the fraudulent transfer issue's the wrong claim if what you're trying to do is you're trying to reach all the way back. Because think about it. From the debtor's perspective, just 548, what transfer of assets did the debtor make? They didn't make any, right? So, you've gotta look at the other side of 548 and you gotta look at the occurrence of the obligation. 27:37 27:41 27:45 27:48 27:54 27:58 28:00 28:02

Who are you gonna sue? An entity that doesn't exist? And what's what gonna get you? You know, are you now reaching into 550 and trying to make creative use of 550 to get there? And what's the 28:05 28:11 28:13 28:16

ultimate result of that? And again, I think you come back to, I mean, all of these are unrelated, you know. What does that funding agreement really say?

You know, in Jones' mind that's not the scary lawsuit that if this really is a negotiation where you get people at the table. But that's -- that's just my view.

MR. GORDON: Yeah, and I -- and I would just say that when we've seen these fraudulent conveyance allegations be made or even when there have been some lawsuits filed, typically when you read the complaints or you hear the allegations, the -- the way they get there is they just ignore the funding agreement. It's as if it doesn't exist. And so, they -- they -- they -- there's a bunch of pejorative terms that are typically used, but one we often hear is that, you know, bad co and a good co.

And they just talk about how the bad co has been left with very limited assets and, you know, all the good assets were sent to the other entity. But with absolutely no discussion, no disclosure about the funding agreement. And from our perspective, the funding agreement's key and it's so important that in our cases in our first day declarations, we've

attached that as an exhibit just to sort of say to the -- the judge or the court right off the bat, look, this was done. It just -- we don't want you to be confused about it. This is what we -- we've done. Then the argument turned to well, it's a loser. 29:29 29:31 29:34 29:38 29:40

MS. TSIOURIS: Greg, sorry to interrupt you. 29:41

MR. GORDON: Yeah. 29:41

MS. TSIOURIS: Could it be that people are worried that the funding agreement is illusory? And how do you combat those arguments? 29:42 29:46 29:47

MR. GORDON: Well, that's what I was just gonna say. 29:47 29:47

MS. TSIOURIS: Okay. Go for it. 29:48

MR. GORDON: Yeah. All right. That's -- that's good. We're in sync, yeah. So, I was gonna say then the argument turned to it's illusory. Well, how it is illusory? Well, because it's not the same as the claimants having a direct claim to the assets. Like if the entire company had filed, they would have a direct claim. Everything would be there. 29:50 29:52 29:54 29:59 30:03 30:04 30:07 30:08

And my view on that is that's sort of a form of resubstance in a way, and I ever heard -- I've -- I've heard judges say that, you know, the problem is that you've got the affiliates, and the debtor is 30:11 30:14 30:17 30:20

never going to enforce the funding agreement. So, that -- that's the problem. You have the funding agreement but the claimants are now a step removed. The debtor isn't going to enforce it. 30:22 30:24 30:27 30:28

And -- and my reaction to that is that's kind of an insult to the bankruptcy judge. So, we're -- we're There in the bankruptcy court. We're a debtor in possession. We're a fiduciary. We elect not -- the other side breaches, we elect not to enforce? Is the bankruptcy judge gonna let us get away with that? You -- 30:30 30:33 30:36 30:39 30:40 30:42 30:44

JUDGE JONES: So, let me -- let me -- 30:45

MR. GORDON: What would you do? 30:46

JUDGE JONES: I try all sorts of things, but that's certainly (inaudible). So, -- so, could I ask you the finding agreement. Executed pre-petition? Post-petition? 30:47 30:50 30:53 30:54

GORDON: Pre-petition. 30:55

JUDGE JONES: What do you view that agreement is? Is it an executory contract that must be assumed? 30:57 31:00

MR. GORDON: Ah. 31:00

JUDGE JONES: Is it something else? What's -- what -- what does all that mean? 31:01 31:04

MR. GORDON: That's a very complicated issue which -- 31:05 31:07

JUDGE JONES: I have lots of time. 31:10

MR. GORDON: Yes, but this audience doesn't have lots of time. I'm -- I'm not gonna answer that question. 31:12 31:15 31:16

JUDGE JONES: Is there a United States Marshall in the room? 31:18 31:20

MR. GORDON: So -- 31:22

MS. KIELSON: Is there -- is there any negotiation in the funding agreement? I assume that with any of the plaintiff's bar or -- 31:24 31:27 31:31

MR. GORDON: Well, you know, that -- again, that -- that's an argument we hear all the time. This is an agreement. It wasn't negotiated. It's between affiliates. And we don't deny that. I mean, it's not like affiliates negotiate with each other in that sense. 31:32 31:34 31:37 31:40 31:44 31:45

To me, the question is is it a -- is it a fair agreement? It is beneficial to the estate or not? That's all open. I mean, we're -- you know, we're there. We've tried to be open in all these cases. We are here. We are disclosing everything. This is what we've done. We described in detail every step of these transactions. We turned over all the documents for these transactions, and we said it's -- it's completely open and, you know, we'll 31:47 31:50 31:54 31:56 31:59 32:02 32:05 32:08 32:11

answer any questions. 32:11

And, you know, we -- what we get back are a lot of very generalized, negative statements. It's a bad co. It's a fraud. It's -- it harmed claimants, but there's never any real specifics. And even with the funding agreements, it's been frustrating because we'll hear this is an illusory contract that has all kinds of problems, and we'll say okay, what are the problems? Because we'll listen to your concerns and we'll try to address them, and that's a dialogue we generally have not had in many cases. 32:14 32:16 32:20 32:23 32:25 32:28 32:30 32:34 32:36 32:38

JUDGE JONES: So, I want to come back to my question. 32:39 32:39

MR. GORDON: Yeah. 32:40

JUDGE JONES: So, what -- what is it? What do you do with it? Do you get it approved by the court? Does it just -- 32:42 32:44 32:45

MR. GORDON: We did not get them approved by the court, no, because they were in place when the filing occurred. 32:46 32:50 32:50

JUDGE JONES: So, -- so, you must take the position that they're not executory, right? 32:52 32:54

MR. GORDON: I'm not going to reduce my -- my flexibility on that issue. 32:57 32:59

FEMALE SPEAKER: Go (inaudible). 33:01

MR. GLEIT: You know, I actually have a question which is, you know, we're talking about the funding agreement and constructive fraudulent conveyance. You know, at one point I thought maybe an intentional fraudulent conveyance could be a stronger argument with like intent to hinder, delay creditors. Now, how'd you tackle that, Greg? 33:02 33:03 33:05 33:07 33:09 33:14 33:15

MR. GORDON: Well, I think -- I think to me, the one -- the one big problem with an intentional fraudulent conveyance, it seems to me as a practical matter you have to be able to show that you were hurt. There has to be some kind of damage. 33:18 33:20 33:22 33:25 33:27

So, I would submit you can't even get out of the starting gates with that because you haven't been -- you -- you just haven't been hurt by it. 33:29 33:31 33:35

MS. TSIOURIS: So, Jeff, just that was my -- gonna be my second question. Do we think that actual fraudulent transfer claims here are stronger? And it sounds like, you know, Greg's view is, you know, there's no -- you have to show that you're hurt and there's no harm shown yet. 33:38 33:39 33:43 33:46 33:48 33:50

MR. GORDON: Well, that's one thing. And I -- I -- I think the other thing is if you're trying to make a hinder or delay case, that to me is based on the fact that there was a bankruptcy filing. And if 33:51 33:54 33:57 34:00

that's the basis for an intentional fraudulent conveyance claim or actual fraudulent conveyance claim, it seems to me any time any company files for bankruptcy you could make that argument. And that, to me, doesn't make -- make sense either. 34:03 34:04 34:08 34:10 34:12

JUDGE JONES: So, I also I just want to make sure that we don't forget that, you know, we talk about this in broad terms and even while -- even though I think it's the wrong claim as I've said before, I -- every one of these is going to be slightly different. 34:14 34:17 34:20 34:22 34:28 34:28

And so, I do think that there are degrees based upon all sorts of factors that you could reach different conclusions about a particular transaction. And I don't -- I don't think that any of us should leave with the notion that well, this is always good or this is always bad. I -- actually think that there's so many moving parts to this that you have to look at the entirety of the structure before you start deciding what to do about it. I -- I just don't think it's one of those black and white issues. 34:31 34:35 34:39 34:42 34:45 34:48 34:51 34:55 34:57 34:59

MR. GORDON: So, -- so, I completely agree with that. And one of the frustrations I've had -- 35:02 35:04

JUDGE JONES: And -- and then we can move to the executory (inaudible), huh? 35:05 35:07

MR. GORDON: And -- and one of the frustrations I've had is the other side I think always tries to make it just this black and white thing, and from their -- what -- what I hear from their arguments is any divisional merger that's done prior to a bankruptcy is a problem. It -- it -- it -- it -- it -- it leads to a conclusion definitively that it was a bad faith filing. It's definitely a fraudulent conveyance, and I've said in some of these arguments we've had, that -- that just can't right.

It can't be that every divisional merger no matter how it's done, no matter how assets or liabilities are allocated, whether there's a funding agreement or there's not a funding agreement, it can't that they're all bad. And so, that -- that's why I strongly agree with what you're saying.

I -- I do agree they need to be evaluated, and you can certainly envision ways that a divisional merger would be done that would be a problem. But the question is is -- is the transaction before the court? And, you know, its various indicia, is that a problem or not?

MS. TSIOURIS: So, just touching on the bad faith argument for a bit, and understanding that, you know, these cares are nuanced. But how strong

do you think, Brya, the bad faith argument is in these Texas Two Step cases where it seems that the clear purpose is taking advantage of either 524G, the channeling provisions that were put in place after the asbestos litigation, and/or just dealing with these, you know, MDL litigations that, you know, J&J is dealing with? 36:19 36:22 36:26 36:29 36:33 36:36 36:38

MS. KIELSON: I think -- I think like we just said, it's very case specific. I think I can see a situation where a company intentionally -- I mean, it's extreme but right, intentionally creates a product that they know is poisonous. There's all these claimants, and they put it into bankruptcy with this Texas Two Step. 36:40 36:43 36:47 36:50 36:53 36:55

And so, I think that there definitely are degrees and it's very fact specific, and I think that we can't lose sight of, as we just said, that -- that -- that for sure is a possibility. 36:59 37:02 37:05 37:07

MS. TSIOURIS: Okay. And so, we've talked a lot from the company's perspective about the pros of a company putting itself through this Texas Two Step plan. Maybe does anybody want to take, you know, the side of there's some pros here for claimants or creditors in terms of having these types of claims estimated and run through and paid through the 37:10 37:15 37:17 37:22 37:24 37:28 37:30

bankruptcy process as opposed to staying outside of the bankruptcy court? 37:33 37:34

MR. GLEIT: Yeah, I'm happy to start with that. Look, when I first read about J&J I was offended. I thought it was outrageous and it was harming claimants and creditors. And as I delved into it more, and, you know, in looking through the Purdue case as well actually, I -- I believe that the pro for the claimants would be that it leads to a more equitable distribution. 37:36 37:41 37:43 37:45 37:49 37:53 37:55 37:56

So, Greg had mentioned, if you're the first claimant and you get 4-billion-dollar judgment, you're not happy about this Texas Two Step. But if you're number 40,000 online and waiting for the remaining assets to be distributed to you, you're never gonna see a dime. 37:58 38:02 38:05 38:08 38:10 38:12

What -- what -- what this does is it creates a forum where everyone can file their claims, and on a more judicial, equitable basis you will provide a benefit, you know, to all claimants. And I -- I actually truly do believe that. And is it a perfect system? No. We all know that, but -- but it is one way of -- of -- of -- of protecting claimants. 38:14 38:18 38:22 38:26 38:29 38:33 38:36

And -- and when you see some of these cases, I mean, whether it's Purdue or Johnson and Johnson, 38:38 38:41

sometimes like a lot of the objectives in the bar or in, you know, the plaintiff's bar, it's really just political, you know, to get your name in the press. And if you really think about it, a fair process where 76 percent of the creditors, you know, have a -- have to sign onto, it's a fair process with an imperfect world. So -- 38:43 38:45 38:47 38:52 38:55 38:59 39:01

MS. KIELSON: It does seem though that which I just realized or remembered that you had mentioned the MDL. Is this -- is this a situation where bankruptcy potentially is going to supplant that? 39:02 39:04 39:07 39:11

MS. TSIOURIS: That process. 39:12

MS. KIELSON: That process? And is that politically or otherwise something that, you know, we collectively can get behind? Is that -- is that where this is going and maybe it's just in certain situations? But I think that definitely is an interesting issue, because from their perspectives who are we to say that this is the best thing for the claimants? 39:15 39:18 39:22 39:23 39:25 39:28 39:31 39:31

But then to analogize it to preferences, it -- it's a similar type of a situation. Yes, you were beneficial. You know, you were benefited by being paid first, but shouldn't it really be in the spirit of the code that it's all pooled together and everyone 39:34 39:37 39:39 39:42 39:45

is treated equally? So, it's -- it's something that I kind of go back and forth with with regard to that. 39:48 39:51

MS. TSIOURIS: Yeah. 39:51

JUDGE JONES: So, and I'm sorry. If we could go back in history just a bit that you all are way too young. But if we go back to the asbestos world if you remember what that was like in its heyday, you had a lot of the same reactions from the plaintiff's bar, and you had -- you had a pull and a tug going on. And there -- there was a balance of we want to pay, we, you know, we have to pay claims. We want to be able to go forward. You're -- you're trying to balance that with the right of everyone to have their day in court whatever that means. 39:54 39:58 40:02 40:06 40:09 40:12 40:16 40:18 40:20 40:24 40:28

And you saw over time that a process developed. And I think that most folks today would tell you that that process ended up in a really good place although it took some time. 40:32 40:35 40:39 40:41

And I think you also, and this is just the different environment at least from my point of view, what you saw back then was you saw Congress saying what does the judiciary need in order to become efficient in the administration of these types of cases and claims. And it gets me to if you've read the legislation as I'm sure that you all have, 40:43 40:46 40:50 40:54 40:58 41:01 41:05

there's been a entirely different tone. 41:08

It's -- and I have all the respect in the world 41:10

for -- for those folks who sit in Congress and -- and 41:13

-- and deal with what they with and -- and put forth 41:15

legislation. But it's changed to now we're gonna 41:20

tell you what you need and what you can and can't do, 41:23

and it really bothers -- it really bothers me that 41:27

we're now gonna define a class that we're gonna say 41:30

if you fall in this class you can't have access to 41:34

the bankruptcy process. I mean, that just really 41:36

bothers me from an open court's prospective. 41:38

Do I think that we're at the right place with 41:42

respect to the Texas Two Step? Of course, I don't. 41:45

I mean, we've had four cases. I do think as -- as 41:48

we see more cases filed, and I do think that you will, 41:53

I think you'll see the process that has worked so well 41:56

over so many years is that we'll find the right place 41:59

for those claims to get handled. I -- I hope that at 42:03

some point Congress will say judges already have a 42:07

host of tools. Maybe we need to expand 524G which 42:11

is something I've advocated for a really long time. 42:14

No one listens. 42:16

But I -- I do think that eventually it'll get 42:20

to the right place. Because as you said, this is all 42:22

about money and I -- I know you said it kind of 42:24

tongue in check, but economics -- if you assume that economic actors act in their own self interest which is something so easy to predict and it's something that keeps everything fair and open, that we'll end up in a process that just makes sense. 42:27 42:30 42:33 42:37 42:39

And again, I, you know, I don't have one of these, but I've been thinking about it an awful lot, and my belief is I have a whole tool chest of things that I can do to push the A case in my mind in the right direction, you know, whatever -- whatever that might be. That was way longer than it was inside my head and I apologize. 42:43 42:47 42:51 42:57 42:59 43:01 43:03

MR. GORDON: So, I -- so, -- so, I would just add a couple of things. The -- you know, the MDLs can't do what a bankruptcy case can do. And, you now, we -- we shouldn't underestimate what can be accomplished in bankruptcy, but an MDL, for example, can't do anything with future claims. 43:06 43:09 43:13 43:15 43:18 43:21

And so, in the LTL case, I mean, you've got literally projections of another 50 years of tens of thousands of claims being filed. An MDL can't do anything with that. MDL is a very limited utility. It's basically at best a settlement vehicle. It provides some information to the parties to try to help them settle, but it can't do anything for future 43:24 43:29 43:32 43:35 43:40 43:42 43:45

claims.

In -- in addition, it's kind of undisputed by everyone I think that the tort system doesn't work for mass tort claims. It just doesn't work. And the J&J case again is a -- is a great example. J&J has been able to -- to litigate only 10 cases per year. So, think about that. You have 40,000 pending cases. You can do the math. What's that, 4,000 years? I mean, it's just -- it's just not the answer.

And, there's been other attempts to try to figure out ways to overcome the tort system. You may -- well, I can remember because I've been around for a while, but there are efforts to do it by class action settlements, and those were ultimately rejected by the Supreme Court. Supreme Court said you can't do it this way.

And, you know, Congress has recognized in the past that the -- the tort system doesn't work for mass torts. And companies like the situation with J&J, unless you're just willing to put yourself in a position where you have a completely untenable situation, unmanageable litigation, bankruptcy is really the only option. And if you really want to get a permanent resolution of the liability that allows you to deal with all current claims and all

future claims, that offers the only option. And then the question is how do you do it? 45:05 45:08

And in these cases, these companies decided that this was the best way for them. The feeling was that this -- this reduced their risks. It reduced potential value loss for the business, but at the same time, it was done in a way where the claimants were essentially in the exact same position. Yeah, their litigation has stayed. They don't like that. I get that. But their litigation would've been stayed if the entire company filed. 45:12 45:14 45:17 45:19 45:22 45:25 45:29 45:30 45:33

So, you know, from our perspective, there's just the -- the status quo was an untenable situation. Bankruptcy presented the only option. And bankruptcy you can -- you can get to a resolution that solves the problem, and it solves it in a way that I believe is fair to everyone. 45:37 45:41 45:44 45:47 45:50 45:52

MS. TSIOURIS: So, we have a couple questions here. I think we've answered them. Greg's answered them in his latest response, but -- 45:55 45:58 46:00

MR. GORDON: Well, I wonder. There's one other thing I wanted to come back to if I could. 46:00 46:02

MS. TSIOURIS: Oh, please, yeah. 46:02

MR. GORDON: And that was the bad faith -- 46:04

MS. TSIOURIS: Okay. 46:04

MR. GORDON: -- question. So, I mean obviously, the -- the -- the other big issue here besides fraudulent transfer, and to my mind is the bigger issue, is whether filing a bankruptcy like this after a divisional merger is bad faith. Whether the case should be dismissed as a bad faith filing. 46:06 46:09 46:11 46:15 46:18 46:20

And to me again, going back to what Judge Jones says, it's a matter of what the facts and circumstances are and whether the case was -- was handled properly. And in the Third Circuit, you know, the standards are basically, did the case have a proper purpose? Judge Kaplan found that it did because the -- the purpose is to permanently resolve a very difficult liability that was incapable of being resolved in the tort system. 46:25 46:27 46:31 46:34 46:38 46:43 46:46 46:49 46:50

Was the purpose of the bankruptcy just a litigation strategy? Some kind of strategy to get an advantage in a litigation, in a lawsuit? And I think Judge Kaplan correctly found that's not the situation here. It's not like there was a lawsuit or a small handful of lawsuits and you were trying to change the relative positions of the parties in that litigation. 46:54 46:56 47:01 47:03 47:06 47:09 47:12 47:13

And the other component is, is the company in financial distress? Was there really a need for a 47:16 47:19

bankruptcy filing? And Judge Kaplan again found that there was financial distress. And I -- I submit that in the -- the LTL situation, that was a -- that was a relatively easy determination to make given what I described before with the thousands of lawsuits, the billions of dollars being paid, the prospect of decades of additional litigation, the -- the potential for massive verdicts at any time. That -- that's -- if that's not financial distress, I don't know what financial distress is. 47:22 47:25 47:28 47:31 47:35 47:38 47:41 47:45 47:48 47:49

So, the reason I -- I wanted to come back to that is, again, to Judge Jones' point, it's not like every one of these cases could survive a -- a bad faith attack. In fact, you know, this case is on appeal. Maybe it'll get reversed. I -- I -- I don't know. But you can envision other situations where companies couldn't make -- you know, could not overcome these standards. Maybe they can't really show they're in financial distress because the litigation is manageable. Or -- or, you know, or maybe it really was a litigation tactic if you look at it more closely. Or maybe there really wasn't a a proper purpose. Maybe their -- their aim was to do something else. 47:51 47:54 47:58 48:01 48:03 48:06 48:09 48:12 48:14 48:17 48:19 48:23 48:25 48:26

So, there are safeguards built in not only in 48:28

the code itself, but in the, you know, judicial gloss that's been put on the code that seems to me protects against the parade of horribles that we hear about from the other side in all these cases. 48:31 48:34 48:37 48:39

MS. TSIOURIS: So, Greg, so there -- we have a set of questions. I think one you answered, but it's basically if the funding agreement is rock solid, then what's the purpose of the divisional transaction? I think you answered that in your previous questions. 48:41 48:45 48:48 48:51 48:54

The second -- previous answers. The second question is does J&J differ from Tronox based on the existence of the funding agreement? I don't know how familiar you are with Tronox off the top of your head if there was a funding agreement there or not? 48:57 49:02 49:05 49:06 49:10

MR. GORDON: I don't know that detail of Tronox. 49:12

MS. TSIOURIS: Yeah, I'm trying to (crosstalk) -- 49:13

MR. GLEIT: I don't think there was one, and I think that was the -- the big issue in the case. It was spinoff. They literally just put a bunch of bad assets in the subsidiary and then the case was unwound. 49:14 49:15 49:18 49:21 49:22

FEMALE SPEAKER: There was no funding agreement. 49:23

MR. GLEIT: Okay. 49:24

MS. TSIOURIS: No funding agreement. Thank you to the audience member. So, I want to shift a little 49:2 49:29

bit more to kind of where we see this going, and yes? 49:33

MALE SPEAKER: I -- was wondering if the -- if 49:34

the panel could address. There's at least two cases 49:38

in -- in North Carolina where the tort committee has 4 9:45

started a (inaudible) consolidation as a way to bring 49:49

in the -- all the assets of the parent company that 49:51

divided. I was wondering what the panel thinks about 49:53

that tactic. 49:55

MR. GORDON: Well, I'm not a fan of that. I 50:01

mean, honestly -- well, first of all, Judge Whitley 50:05

who I have a great deal of respect for, he's allowed 50:09

that litigation to proceed. We moved to dismiss 50:11

those lawsuits, and we thought we had good arguments 50:16

on the motion to dismiss. He -- he denied those 50:19

motions. But to me, it -- it's not a good fit for 50:21

this. It doesn't make sense. 50:23

If you look at the standards for substantive 50:26

consolidation, they can't -- they can't be met in my 50:29

view. There's no facts that really support 50:31

substantive consolidation. And that's putting aside 50:34

the threshold issue that personally I can't get past 50:37

which is I've never understood, and I know there's 50:39

some courts in the Ninth Circuit that disagree with 50:41

me. I've never understood that you could literally 50:44

substantively consolidate a non-debtor into a debtor. 50:47

That, to me, is effectively an involuntary petition against a non-debtor. That -- that just makes no sense to me. 50:50 50:53 50:54

I don't believe those lawsuits will ever have any real legs even though we didn't prevail on -- on dismissal. But -- but even from the standard itself, you know, as you know, generally you've got to show that either the assets are so mixed they -- they can't be separated, or that the company's basically engaged in some sort of fraudulent shell game or misrepresented their, you know, corporate status and the like. And there's no facts related that the divisional mergers in my judgement that support any of that. 50:57 51:01 51:03 51:06 51:08 51:12 51:14 51:17 51:19 51:22 51:24

So, we're disappointed with the result, but at the end of the day, I don't lose sleep over -- over those lawsuits. 51:26 51:28 51:30

JUDGE JONES: So, let me add to that. And -- and could the gentleman just raise his hand again so I can -- I'm sorry. I just I lost track of you. I -- I got you. 51:33 51:35 51:38 51:38

I've only read the complaints. I don't know any of the other facts other than what's in the papers. With what's in the papers, it doesn't make sense to me. As I told you before, I actually think there is 51:44 51:47 51:51 51:55

a scary lawsuit out there. That's not -- that's --

MALE SPEAKER: (Inaudible).

JUDGE JONES: Nope, that's not it. But I -- I applaud you for really narrowing that down. But again, if again just what's in the papers it doesn't make sense to me that that's -- that that's a direction that's gonna bear fruit. But obviously, I could -- I could be wrong.

You know, the fact that it survived a motion to dismiss in today's world doesn't mean very much to me. I think one of the next steps to take place we may all learn something at least with respect to one judge's view of -- of the claims. But I, you know, I think there are better ways to spend time.

MALE SPEAKER: I've got a question for Greg. (Inaudible). You had said earlier, I think, that the Texas (inaudible) for a long time going back to 1989, and that you hadn't really thought about it until 2016.

Can you share with us was there a moment where it dawned on you that that was the tool that you wanted to use? In Bestwall what made you decide to go that route when we'd seen other (inaudible) exercised in previous mass tort (inaudible)?

MR. GORDON: Yeah. All -- all I can say about that is we considered a lot of different options for preceding with a corporate restructuring. And after looking at the options and thinking through what the issues the company would likely face in a bankruptcy, we viewed that to be the best option. 53:17 53:22 53:26 53:29 53:34 53:36

JUDGE JONES: At some point will we get to meet the young man or woman that actually came up with the idea? 53:39 53:41 53:42

MR. GORDON: Which idea? 53:44

JUDGE JONES: I was just having -- I'm -- I'm going back to the whole executory comment. That was -- it was a circle. I see you do have a couple of other questions. 53:46 53:49 53:52 53:53

MS. TSIOURIS: Oh, yes. 53:54

MALE SPEAKER: A quick question regarding constructive (inaudible). The assets, even if you argue that through the funding agreement the average will be part of the (inaudible). The other other side of the arragement is the liability. When the company is coming to the court with a petition, these tort (inaudible) are unliquidated. 53:55 54:00 54:06 54:09 54:12 54:16 54:18

How do you address the fact? What is the value of (inaudible) liability and whether the assets are (inaudible)? 54:22 54:24 54:27

MR. GORDON: Well, I -- I would say that first of all, to do a -- a standard constructive fraudulent conveyance analysis, you would need to estimate the liability. But I would say that's all irrelevant in these divisional mergers the way they've bee done, because all the assets that were available before remain available, so it doesn't matter whether the company was technically insolvent before or not. It has the same ability to pay as it did before, so in my mind that just makes that issue irrelevant.

JUDGE JONES: So, if -- if I could just take a slightly different approach to that is that there are professionals out there whose entire careers are built upon estimating, you know, the average claim in a mass tort case. And those are the, you know -- it just becomes a -- a sort of war of the experts if you will.

But I -- there are folks out there who give -- who can -- you know, they've go this model already built. They can plug it in. They can change the assumptions, and they can -- they can give you -- they can give you their best estimate based upon whatever set of input you give them.

If -- if I were doing it, that's what I would do. I mean, and that's what I would expect to be shown if it came to me in the context of litigation.

Is that helpful at all? 55:49

MALE SPEAKER: Yeah. Thank you. 55:51

JUDGE JONES: Okay. 55:51

MS. TSIOURIS: I saw a second hand. Yeah? 55:52

MALE SPEAKER: I'm still confused, I guess. If all of these assets remain available, I'm having a hard time understanding the purpose of the additional transaction and why you just don't put the entire entity into bankruptcy and then propose the same sort of mass tort resolution scheme as part of the class both present and future. What's the purpose of the divisional transaction if everything is still available? 55:56 56:02 56:05 56:08 56:12 56:16 56:20 56:22 56:22

MR. GORDON: Well, the -- the purpose is that you avoid having the entire company and all it's other stakeholders subjected to a bankruptcy filing. 56:26 56:30 56:33

So, imagine with a Georgia Pacific or a -- this Johnson and Johnson and subsidiary, how much more complex and difficult the bankruptcy case would be. I mean, you'd have all other manner of stakeholders you would have to deal with, much larger company subjected to, you know, all the -- the obligations of a bankruptcy filing. Far more complicated, and for -- from my perspective for no real -- for no real purpose. 56:37 56:41 56:46 56:50 56:55 56:59 57:02 57:05 57:06

And -- and I would submit that the claimants are actually better off by companies that do it this way. Because from their perspective, they -- they don't have the worry that the entity that's a backstop for the funding is subjected to the risk of a bankruptcy filing and the potential loss in value. But -- but that's the reason to avoid the complexity, the cost, the impact on customers, suppliers, and others, and just instead focusing on the liability that needs to be addressed. 57:08 57:14 57:16 57:20 57:23 57:25 57:30 57:33 57:36 57:37

MALE SPEAKER: And is the funding agreement just one secured obligation of the entity? So, in other words -- 57:40 57:44 57:44

MR. GORDON: It is. 57:44

MALE SPEAKER: -- that you know that -- that -- that entity that is free of the liabilities goes out into the marketplace but it could in theory encumber all of its assets and that funding agreement would be subordinate to all that secure net? 57:46 57:50 57:54 57:58 57:59

MR. GORDON: Theoretically it could do that. 58:00

MALE SPEAKER: That might be a reason why you'd want the (inaudible) go in. 58:02 58:03

MR. GORDON: Well, and I -- that -- that's an argument that's been made on the other -- on the other side. I mean, from my perspective, it -- it 58:05 58:07 58:10

wouldn't make sense. 58:12
It's always to me been impractical and illogical 58:15
for people to argue that a company would go through 58:17
this process for the purpose of resolving its 58:21
liabilities, then would take steps to basically 58:24
undermine the whole purpose of the transaction. 58:27
Because then you could imagine well-founded 58:30
fraudulent conveyance suits. You could imagine the 58:32
case being dismissed as a bad faith filing or 58:35
dismissed for other -- on other grounds. And I -- 58:38
that just seems very impractical. To me, in -- in 58:40
all of these cases, there's never been a default 58:43
under the funding agreements. The payments are being 58:45
made regularly to support the funding of the 58:48
professional fees which are substantial in the cases. 58:52
JUDGE JONES: So, I if -- if I could just add to 58:54
that just a bit to try to take your question in a 58:57
little different direction. 58:58
There aren't any rules that I'm aware of as to 59:02
what a funding agreement has to say, what it has to 59:05
be, what it is comprised of. And I do think that all 59:09
of those issues -- and again, coming back around to 59:12
the executory nature of the obligation if it is one, 59:16
I think there are a whole host of things that can be 59:19
done if there's a concern about the relative strengths 59:23

or weaknesses of that funding agreement. Haven't really seen that play out. I mean, it's -- we haven't gotten to the point yet where we've really started to test what -- to test the composition of those agreements. 59:25 59:28 59:31 59:34 59:36

But I also want to come back to where you started why do it? I'm gonna come back to a prior comment I made where every single one of these is different. And let me pick an example which I hope pertains to nothing that's pending. 59:37 59:42 59:45 59:49 59:51

You know, think about if you -- if you had a situation where you had a mass tort liability but your business model included relationships with foreign governments. I mean, you could -- and, you know, when you -- when a governmental entity, and I've had a couple of these, when they find out that there is a U.S. bankruptcy, there is a horrible reaction to that concept. 59:54 59:56 60:00 60:03 60:06 60:09 60:14 60:15

So, I mean, there could be all sorts of strategic reasons both driven by business as well as ultimate resolution that you could make that decision. And I don't think that there's a -- there's a simple answer as to why do it. I think you have to say which case, what the issues are, what's trying to be accomplished because I think that they will vary. 60:17 60:20 60:23 60:26 60:30 60:33 60:36

I -- I certainly think there could be a well, I went to this seminar and I saw Texas Two Step and, you know, that just seems really fun. Which since -- since we're almost done, I have to share with you. I was -- I was speaking -- I was speaking to the New York TMA earlier this week, and we were talking about the Texas Two Step and I got asked a lot of questions. And again, you guys do realize I don't have one of these, so it's just an opinion. 60:39 60:42 60:44 60:46 60:50 60:55 60:58 60:59 61:03

And I -- I continue to talk to a lot of -- a lot of the folks that I came up with who are doing these transactions, have done them for years, and it's really interesting. Because I came out of -- I came out of (inaudible). I know that's not surprising given where I live. And I talk to a lot of the folks that do these transactions and they go, well, you know, it's all funny. The Texas Two Step is, you know, we're all laughing at that, you know. We do, you know -- we use the Pennsylvania statute, and we have in an effort to follow suit, we have named it the Pennsylvania Polka. That -- that's -- that's all the wisdom I got today. 61:07 61:10 61:13 61:15 61:17 61:21 61:23 61:26 61:27 61:30 61:33 61:37 61:40

MS. TSIOURIS: All right. We're past the hour. I saw one more hand, but I feel free for folks who have questions to come up the panelists. I just want 61:42 61:45 61:48

to thank the panelists very much for all their time today, and the audience (crosstalk) --

JUDGE JONES: No, thank you guys. Really appreciate it.

CERTIFICATE

- - -

I, Wendy Letner, Transcriptionist, do hereby certify that I was authorized to and did listen to and transcribe the foregoing recorded proceedings and that the transcript is a true record to the best of my professional ability.

Dated this 25th day of May, 2022.

_____

Wendy Letner

Exhibit 5

Confidential – Professional Eyes Only
Subject to Protective Order

In re LTL Management, Case No. 21-30589 (MBK)

Debtor's Supplemental Response to Official Committee of Talc Claimants' RPD No. 40

Subject to and without waiving its objections to the Official Committee of Talc Claimants' Request for Production of Documents No. 40, the Debtor provides the following supplemental information in lieu of production.

Before the filing of the petition in Debtor's chapter 11 case,

- 5,738 talc-related ovarian cancer claims were resolved for payments totaling $526,632,000.00; and
- 1,098 talc-related mesothelioma claims were resolved for payments totaling $439,730,000.00.

The table below shows the amount of payments per year for talc-related mesothelioma claims and talc-related ovarian cancer claims:

Year	Talc-Related Mesothelioma Payments	Talc-Related Ovarian Cancer Payments
2017	$950,000.00	$0
2018	$750,000.00	$0
2019	$15,600,000.00	$0
2020	$300,390,000.00	$265,000,000.00
2021	$122,040,000.00	$261,632,000.00
Total	$439,730,000.00	$526,632,000.00

At the time of the filing of the petition in Debtor's chapter 11 case, the Debtor owed:

- $144,000.00 in connection with the resolution of 24 talc-related ovarian cancer claims; and
- $325,000.00 in connection with the resolution of 1 talc-related mesothelioma claim.

EXHIBIT 6

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

IN RE:	.	Case No. 22-2606
	.	
AEARO TECHNOLOGIES, LLC, et al.,	.	Everett McKinley Dirksen Courthouse
	.	219 S. Dearborn St., Room 2722
Debtor.	.	Chicago, IL 60604
	.	
	.	April 4, 2023
. . . . .		1:19 p.m.

TRANSCRIPT OF ORAL ARGUMENT
BEFORE THE HONORABLE FRANK H. EASTERBROOK
UNITED STATES SEVENTH CIRCUIT JUDGE
and THE HONORABLE DIANE P. WOOD
UNITED STATES SEVENTH CIRCUIT JUDGE
and THE HONORABLE DAVID F. HAMILTON
UNITED STATES SEVENTH CIRCUIT JUDGE

APPEARANCES:

For the Appellants:	Clement & Murphy, PLLC By: PAUL D. CLEMENT, ESQ. 706 Duke Street Alexandria, VA 22314
For Amicus Curaie U.S. Trustee:	Department of Justice By: SEAN JANDA, ESQ. 950 Pennsylvania Avenue N.W. Washington, DC 20530
For Appellees Official Committee of Unsecured Creditors:	Kellogg, Hansen, Todd, Figel & Frederick, PLLC By: DAVID CHARLES FREDERICK, ESQ. 1615 M Street, N.W., Suite 400 Washington, DC 20036

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

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THE COURT: Good morning, ladies and gentlemen. Our first case for argument today is, In the Matter of Aearo Technologies. Mr. Clement?

MR. CLEMENT: Good morning, Your Honors, and may it please the Court, Paul Clement for the appellants. I'll endeavor to save five minutes for rebuttal. Nobody doubts that the automatic stay precluded further earplug litigation against the Debtor Aearo in the MDL and in Minnesota, but the Bankruptcy Court held that neither the automatic stay, nor its related to jurisdiction, extended to the same litigation against 3M despite, despite the complete overlap of fat and defenses, the possibility of estoppel and record taint, shared insurance, Aearo's indemnification obligations, and appellee's ongoing efforts to use statements by the MDL Court post petition against Aearo in this bankruptcy.

That decision misunderstood both circuit law and the funding agreement. On the law, the Bankruptcy Court misread this Court's case law on the scope of the automatic stay and related to jurisdiction. This Court recognizes two exceptions to the general rule that the automatic stay applies only to claims against the Debtor. And, as to related to jurisdiction, this Court --

THE COURT: Mr. Clement, how is it possible for there to be exceptions to the language of the automatic stay? The one thing that's been consistent in the Supreme Court's last

ten years of bankruptcy cases is the language controls, there are no exceptions, and it doesn't matter how extreme the circumstances are. All of the cases you rely on predate the modern Supreme Court's approach to bankruptcy law. So, why should we recognize any exceptions at all?

MR. CLEMENT: So, two responses to that, Judge Easterbrook. I mean, obviously if we were here on a complete clean slate that would be a sort of more difficult question for me and --

THE COURT: Well, it is the question for you, because we often say, you know, thirty years ago or twenty years ago, we said or the Fourth Circuit said, tada, tada, tada, but there have been a lot of Supreme Court decisions since then and we have to be consistent with them, so that's the question I'm asking you. In light of the Supreme Court's decisions, not ours, how can there be exceptions?

MR. CLEMENT: So I think that -- I mean, I wish the Supreme Court, in the bankruptcy area, had been quite as textualist as you suggested, because if it were, then I wouldn't have a petition up there in a case I lost in the Fifth Circuit where the Fifth Circuit applied some pre-bankruptcy sort of, you know, dictum about nonsolvent debtors and said the Supreme Court made me do it.

So, I think in order for there to be a situation where you'd have to say, look, the mood music from the Supreme

Court about how to interpret statutes and this statute in particular is so clear, we're going to walk away from our circuit precedent. For better or for worse, I don't think the Supreme Court has been that clear yet.

The other thing that makes it kind of tricky is that in the Celotex case, in the Supreme Court, which is obviously relevant to the related to issue, the Supreme Court, I mean, it was a drive-by citation to be sure, but it cited the A.H. Robins case favorably, which is sort of the source of the exceptions that this Court applied --

THE COURT: Well, we do know what drive-by citations count for.

MR. CLEMENT: No, I --

THE COURT: And what exceptions did we actually apply?

MR. CLEMENT: So, as I read -- well, as I read this Court's cases, in Fernstrum and Fox Valley, the exceptions that this Court has applied have been a --

THE COURT: Discussed maybe.

THE COURT: No applied.

THE COURT: Yes. I'm not sure we applied anything. We discussed some things.

THE COURT: We mentioned it. We didn't rule it out --

MR. CLEMENT: Right and --

THE COURT: -- is the best you can say.

MR. CLEMENT: Yeah, I mean, look, I say you applied in the sense that you took them seriously and found them inapplicable on the facts there, and so to me that is -- that's not just dictum. I also think, for what it's worth, that even if you want to be a pure textualist, the thrust of A.H. Robins and the thrust of the first exceptions this Court has recognized is the idea that when you have a real party in interest, that's still within essentially the text, and --

THE COURT: But, you know, what I'm having -- well, I have a number of problems with your approach, but one of them is how you distinguish the any regular old case of joint and several liability from this case. We all certainly understand that 3M and Aearo are very closely aligned in this litigation, but the automatic stay is supposed to be automatic. You're supposed to just see it. It happens. You're not supposed to have 25 hearings. So, I just don't see how, unless you're going to say the automatic stay applies to everybody with joint and several liability, how your position can hold.

MR. CLEMENT: So, I would say -- I obviously wouldn't say it applies to everybody. I would say that this is --

THE COURT: Because you can't -- because, I mean, no one says that.

MR. CLEMENT: Of course. Of course. But, this seems to be, you know, a truly sort of unique case. This isn't just

joint and several liability. This is a case where essentially 3M's liability in these cases is premised on a memo that Aearo wrote before 3M was in the picture.

THE COURT: So, it's a successor owner --

THE COURT: This is --

THE COURT: Go ahead.

THE COURT: This is every MDL virtually, right. I mean, the -- one of the points that some of the amicus make, they suggest that if this maneuver works, why won't it automatically happen any time a defendant in an MDL starts to get uncomfortable with the MDL Court's rulings?

MR. CLEMENT: Well, I mean, Judge Hamilton -- you know, I think that that question really goes more to the underlying merits of this than the questions that arise under the automatic stay and related to jurisdiction. And, you know, obviously, you could have a situation where you'd say that, all right, they're related to jurisdiction, but I'm not going to exercise it because of some concern on the merits, and I think if you focus on the question that I think it squarely before you, which is the automatic stay, and if you are uncomfortable with the automaticness of the automatic stay then I think related to, under 105, provides sort of the clear answer here, because I think it sort of blinks reality to say --

THE COURT: And what the -- well, I mention the Supreme Court's decisions, but the key one there is law from

2014, which long post dates A.H. Robins and these other cases, which says you can't use Section 105 to fix what you think of as flaws in the bankruptcy code. You carry out the bankruptcy code, but you can't extent it, contradict it, modify it, and so on. Isn't that a problem?

MR. CLEMENT: No. No, I don't think so. We don't think there's anything wrong with the bankruptcy code, but one of the reasons we don't think there's anything wrong with the bankruptcy code is because it includes Section 105(a) and --

THE COURT: No. That's not the point of law. The point of law is you can't use Section 105(a) to do anything other than implement what's in the code, and of course what's in the code is Section 362. I don't see how you use Section 105 to give you relief that Section 362 does not provide.

MR. CLEMENT: Well, Judge, with respect, that would be a complete revolution in the precedent in this circuit and every circuit --

THE COURT: Not in this circuit where we held exactly that in the Kmart case, even before law.

MR. CLEMENT: Well, I don't think that is consistent with circuit law. I don't think that's consistent -- I mean, I must be wrong because you wrote Bush, but I don't think that's --

THE COURT: No --

MR. CLEMENT: -- consistent with Bush.

THE COURT: No. Courts are wrong plenty of times, as you often persuade the Supreme Court about Courts of Appeals.

MR. CLEMENT: Well, and I don't think this Court was wrong in Bush and I don't think law carries all of the weight that you are suggesting, and I think then law would have silently sub silentio overruled Celotex, and I don't think there's any suggestion of that. And, so I do think the related to jurisdiction under 105(a), which itself is something of a misnomer, right. The question is really related to jurisdiction under 1343(b).

THE COURT: Well, I think, Mr. Clement, we're talking past one another. The question is not the scope of the related to jurisdiction. The question is what remedies does Section 105 permit a bankruptcy code -- bankruptcy judge to provide when those remedies are in excess of considered limitations elsewhere in the code. The limitation in 362 is so the stay extends only to the Debtor and its assets.

MR. CLEMENT: But with respect, Judge, that's the automatic stay, and 105(a) is stay that's not automatic. As Judge Wood sort of suggested, it doesn't happen just immediately, so it is susceptible to a process where the Bankruptcy Court finds out more information before it decides whether to stay this litigation. I mean, that's the thrust of a number of this Court's decisions where this Court has said, well, you know, maybe you don't come under the automatic stay,

but you do come under 105(a). The test there is related to. As Judge Wood was suggesting earlier, I mean, you know, if the automatic stay can't apply to all cases of joint and several liability, 105(a) allows a Court to look at the specifics of the particular case, and you know it's hard for me to imagine a case that's more related to both the bankruptcy and the actions that have already been stayed against Aearo.

THE COURT: I'm not sure how far that gets you though, because even if we were to agree with the position that 105(a) is there, and some circuits have suggested that you just can't distort the language of 362 any further, but what you should do is look to 105(a), and even if you could get over the related to jurisdictional barrier, now you're in a discretionary world.

Now, you're in a world where we would assess a District Court's decision not to issue that kind if injunction, and we'd be talking about an injunction, not a stay, for abuse of discretion. We have all the facts on this record. The District -- sorry, the Bankruptcy Court made it quite clear that it wasn't inclined to issue this kind of stay given the nature of the injunction, given the nature of the funding agreement, so I don't know if it gets you all the way home.

MR. CLEMENT: Well, Judge Wood, let me say two things about that. One is, I think really when you get to the decision to exercise discretion to not issue relief under

105(a) here, we're talking about one paragraph and we're talking about a paragraph that I would submit is profoundly distorted by misunderstanding of the jurisdiction, which is what plainly seemed to drive the Court's analysis. I also think there's a misunderstanding of how the funding agreement works and I'd be happy to talk about that in a second.

But, I guess what I would say is, look, if I have to lose this appeal, I would much rather lose it on the ground that you are sketching out, which is to say, okay, 105(a) related to jurisdiction applies, but we're just going to, even though it's a paragraph, we're just going to sort of defer to that paragraph and we're --

THE COURT: It's a paragraph that comes after 30 pages of the discussion of the case and the circumstances which don't really call for that kind of relief.

MR. CLEMENT: With respect though, what it really comes after is about ten pages of misguided discussion about related to jurisdiction and then it's followed by a paragraph that, to me, sort of puts the exclamation point on the misunderstanding because he essentially says, well, if I accepted Heaton's testimony, then there would be an actual economic effect, and it seems to me that if testimony is true, there would be an economic effect, it's sort of the definition of a potential economic effect, which should be enough for the jurisdictional inquiry and --

THE COURT: Can I ask you a question about the funding agreement, Mr. Clement?

MR. CLEMENT: Sure.

THE COURT: Under what conditions would 3M be excused from paying reimbursement requests from Aearo?

MR. CLEMENT: So, if there was a failure in the reps and warranties, for example, that would satisfy. But, I think here's the most important thing that the Bankruptcy Court misunderstood, is if the -- if Aearo makes a request for funding under the funding agreement before it has exhausted its own resources, then that is an improper request and --

THE COURT: Well, exhaustion is not actually the language of the agreement though, is it?

MR. CLEMENT: It's solely to the extent that is the language of the agreement.

THE COURT: Well, it's -- but it let's Aearo make its own judgment. Let me go --

MR. CLEMENT: No, but --

THE COURT: My question about under what conditions 3M could refuse a reimbursement request. For example, one of the conditions is Aearo is supposed to provide a budget every two weeks. I assume it's been complying with that.

MR. CLEMENT: It has, Your Honor.

THE COURT: And -- but, would it be possible for 3M to order its wholly-owned subsidiary, Aearo, to breach so that

-- to breach the terms of that agreement so that 3M could repudiate the reimbursement obligation?

MR. CLEMENT: So, I mean, you know, I'm not sure the answer to that question frankly and -- but and that's why --

THE COURT: Well, it seems pretty obvious to me that it could, right. It's a wholly-owned subsidiary and to the extent that anybody wants to take comfort from Aearo's tying itself to the mast or maybe the rudder of 3M by its indemnification promise in return for this reimbursement request, the reimbursement request seems to me to be at the will of 3M.

MR. CLEMENT: Well, that would actually strongly strengthen the case for granting relief against 3M.

THE COURT: No. Well, it would really call into question Aearo's promise for to -- to indemnify 3M, right?

MR. CLEMENT: I suppose --

THE COURT: You lose all the circularity.

MR. CLEMENT: Yeah, exactly, and the circularity was what was critical to the bankruptcy judge's decision here, and I think it's -- you know, the combination of the circularity and the uncapped nature of the commitment --

THE COURT: But it's inconceivable that Aearo would have gone forward with just a one way indemnification agreement voluntarily two days before it filed for bankruptcy, right?

MR. CLEMENT: I suppose that's right, though, I

supposed that you know -- I mean, Aearo is facing enormous liabilities in this litigation, wholly apart from the indemnification agreement. But, what I would say is, to me, the critical feature of the -- of the funding agreement that I think the Bankruptcy Court either misunderstood or failed to fully appreciate, is that under the agreement the indemnification responsibility of Aearo starts with the first dollar, the first dollar of liability for 3M.

But, the reimbursement responsibility, if you will, doesn't start until the resources of Aearo have been exhausted, and Aearo continues to generate revenue from lines of business that are unrelated to the earplug litigation, which has been discontinued, and so there is a real difference here in terms of the what's in the estate if you stayed the litigation against 3M. Under those circumstances, you have the cash on hand that Aearo has. You have the ability to make claims on the shared insurance, and then you have 3M backstopping it all.

THE COURT: But the shared insurance is problematic, isn't it, because if it's really under 3M's control then is it in the estate?

MR. CLEMENT: I think it is in the estate.

THE COURT: How can it be in the estate if 3M controls it, if 3M can just drain it off?

MR. CLEMENT: I don't know that 3M can just drain it off, which is to say, I mean, if 3M tried to --

THE COURT: Well, then it isn't in the estate --

MR. CLEMENT: If 3M tried to drain it off, I think the automatic stay would apply to that effort. It might not even be (a)(3), it might be (a)(1).

THE COURT: Well, would 3M then consent to an injunction against 3M drawing on that insurance?

MR. CLEMENT: I mean, it might well but --

THE COURT: If you think that's an asset of the estate, even though 3M is an independent owner, then presumably the Bankruptcy Court could and should enjoin 3M from drawing on it --

MR. CLEMENT: Right, but it shouldn't stop there.

THE COURT: -- but the question I'm asking is whether 3M would consent to such an injunction?

MR. CLEMENT: I think it would. I mean, I'd have to consult them, but it shouldn't stop there because --

THE COURT: Yes, I know you want more relief than that, but I'm trying to figure out where 3M stands. I also wonder whether 3M is prepared to post a bond to cover the full value of all claims in the MDL litigation?

MR. CLEMENT: I don't know the answer to that.

THE COURT: Because under our circuit's law, the United Airlines case from 2005, if you're seeking any kind of injunctive relief beyond the stay, a full value bond is required. I mean, you -- 3M is going to have to tell us

whether it wants that. I've got one further questions, which is your brief is a little cagey about this, but are you seeking an injunction against the pursuit of the 2000 State Court cases in Minnesota?

MR. CLEMENT: Yes, we are.

THE COURT: How would that be consistent putting the -- if you're relying on Section 105, how would that be consistent with 28 U.S.C. 2283, the Anti-Injunction Act?

MR. CLEMENT: I don't think -- I mean, first of all, obviously you're asking me a question that has not been briefed by my friends on the other side --

THE COURT: I understand that.

MR. CLEMENT: -- and I think it's the kind of issue that could be waived, but maybe you think it's jurisdictional in a way that it can't be waived. In which case, I'd be happy to try to provide supplemental briefing on that. My -- certainly my understanding is there's not an Anti-Injunction problem with a 105(a) injunction that's directed to State Court litigation.

THE COURT: Well, certainly 2283, which says expressly authorized by law, you don't see any express authorizations for injunctions against state litigation in Section 105.

MR. CLEMENT: So, again --

THE COURT: The Court expressly means, well,

expressly. That's a big problem.

MR. CLEMENT: I would like to tell you and if you want me to, I'd be happy to have the chance to you know brief it, that 105(a) is express for those purposes. It is -- again, my understanding is I can cite you a raft of cases that have exercised 105 related to jurisdiction to enjoin state litigation, as well as federal litigation. And on top of all of that, it is true that, at least when this case started, the principle focus was directed to the MDL litigation, and it's -- just in case, this is in the briefs, but just for the Court's edification, I mean, you know this is a situation where based on intervening developments in the MDL litigation, the MDL litigation against 3M has been stayed for other reasons, and that's part of the reason why I think that, you know, if this Court is convinced that the Bankruptcy Court erred in its construction of the scope of 105 related to jurisdiction and wants to vacate and send it back for the Bankruptcy Court to reaffirm that it meant what it said in that paragraph, or to address that issue anew, I think that would be an appropriate relief.

If it weren't for the intervening stay, I would probably be saying our hair is still on fire, and we'd really like you to rule on the whole thing, but that does take a significant amount of the pressure off of things.

That said, I don't think it in any way moots this or

the like, because that stay is contingent on the Eleventh Circuit accepting interlocutory review in an appeal there and the Eleventh Circuit has been noteworthy in neither accepting nor rejecting that interlocutory appeal, no less consent to --

THE COURT: If I may ask one more quick question about 362 and its text. The bankruptcy code in other chapters does provide for automatic stays to extend to related parties in 1201 and 1301. We don't see that kind of language in 362 or in Chapter 11. Shouldn't that give us pause?

MR. CLEMENT: No. I don't think so, just for two quick reasons. One is, I mean, it's true that (a)(1) doesn't apply by its terms beyond sort of parties, but things like (a)(3) apply to property of the estates without regard to -- of the estate, without regard to the Debtor, so it's even as to Chapter 11, there are provisions that go beyond, but --

THE COURT: Well, let's focus on (a)(1) since that's the provision that's parallel to 12 -- or that is not parallel to 1201(a) and 1301(a).

MR. CLEMENT: Yeah, and what I would say is, you know, that would be another reason for, but for circuit precedent, perhaps to say we're not going to extend it beyond the Debtor, but then you'd still get to 105(a), and I think that this Court has and other Courts have said that, as to 105(a), there's a greater related to scope when it comes to reorganizations under Chapter 11 than under liquidations under

Chapter 7. If I may, thank you, sir.

THE COURT: Mr. Clement, I'll -- we asked you a lot of questions, so I'll -- you can prepare for two minutes of rebuttal. Mr. Frederick?

MR. FREDERICK: Thank you, Judge Easterbrook, and may I please the Court, David Frederick for the appellees. Aearo asks you to be the first Appellate Court ever to hold that a bankruptcy stay should extend to a non-debtor to halt litigation that will have no economic effect on the estate or creditors. The Bankruptcy Court found as a fact that 3M is more than able to meet its financial obligations under the funding agreement, so the attempt to stay cases against 3M doesn't help Aearo's creditors at all.

It's designed to protect 3M, Aearo's wealthy parent corporation, by giving it more leverage in negotiating defective earplug litigation claims. Because of the funding agreement, the Bankruptcy Court correctly found that the earplug suits will not affect Aearo's estate or its reorganization at all. 3M contrived this bankruptcy to help itself, not Aearo or its creditors.

The second major point I'd like to make is that Aearo offers no limiting principal for its position. Under its position, and Judge Wood and Judge Hamilton, your questions have teased out some of this, any joint tortfeasor, any wealthy parent corporation, any fully funded Debtor, can orchestrate a

bankruptcy to get out of the civil justice system. That's functionally what they are doing and they do not offer in their briefing or in the argument this morning, any way in which ruling for them would not delimit the entire bankruptcy system. For those two major reasons, we submit that you have to affirm.

Now, I'm happy to go through the individual specific points. We don't think that 362(a)(1) applies because the earplug suits against 3M are not claims against the Debtor. Your questions about the text, we think are right on. The Bankruptcy Court was correct in saying some other circuits have recognized a textual exceptions. It applies the same test though for unusual circumstances and the Bankruptcy Court, we think, properly situated that analysis under 105. The --

THE COURT: And I would actually like you to focus on 105 for a bit, because as my questions earlier indicated, I have trouble getting over the text of 362, which seems to speak of the Debtor, not other people near the Debtor. But, 105 is a pretty broad discretion and one could approach it, as Judge Easterbrook was saying, by saying the Supreme Court has warned Bankruptcy Courts and other Courts not to take 105 as just a running license to do whatever you feel like doing. But, maybe this isn't that. Maybe it's a way of looking at the particular facts and circumstances.

MR. FREDERICK: Well, I think that the Bankruptcy Court properly did two things. It decided that it didn't have

jurisdiction because the effect of this would not alter the partition of monies to the creditors.

THE COURT: Now, this depended on, in a sense, a finding of fact, didn't it? There was some question about whether -- I mean, 3M for a long time was saying, sure, you know, we've got enough money to cover all of this, and then it backtracked and said, well, gee, maybe we don't.

MR. FREDERICK: Right. But, what the Bankruptcy Court did was it took testimony both from 3M witness, Mr. Dai and the Aearo disinterested director Mr. Stein, and Mr. Stein's testimony was particularly persuasive to the Bankruptcy Court. Mr. Stein said he didn't foresee any circumstance in which 3M would not be able to fund, and that is logical if you look at its latest financial statements. 3M is an $80 billion company. It's ranked 102nd on the Fortune 500 list. It made revenues of 35 billion last year. It made profits of $5.9 billion and there's never been a serious argument that it can't make the funding for the funding agreement and --

THE COURT: Well, and -- but, in fairness, one can also point out that this MDL that lies often, right here it's kind of the elephant in the courtroom, what 290,000 claims or so. The biggest one ever. That's a lot of -- that's a lot of exposure.

MR. FREDERICK: It is a lot of potential exposure, Judge Wood, that has not yet been given a valuation. And, so

the problem is whether or not when you look at this from an ex-anti perspective and you have a funding agreement that say the subsidiary is going to wholly indemnify the parent, but the parent is going to pay every last liability under that indemnification, whether you can say is an ex-anti matter, that's not enough.

THE COURT: So, is there a factual dispute then between you and Mr. Clement, because he's saying, well, actually, 3M isn't going to pay all of this, that Aearo has to exhaust its own resources first, that there's some bundle of money that's not under the indemnification --

MR. FREDERICK: I was surprised to hear Mr. Clement say that, because recital (c) to the funding agreement, which is on Page 272 of the appendix, says that 3M is warranting its ability to pay and that it will pay. That is important because if it had not made that kind of recital representation, there would be a serious argument that this was a fraudulent transfer.

In order to get out of a fraudulent transfer problem, 3M had to make that representation. So, for counsel now to say, oh, we're reconsidering that and there, and answer to Judge Hamilton's questions, there may be an order by the parent to the subsidiary to breach this so that 3M doesn't have to pay, would get us into a very bizarre land where the bankruptcy system is being manipulated by a very wealthy parent that has

every financial wherewithal to satisfy the claims, the potential claims, of these service members who were sent into battle on a lie. That they were going to be given earplugs that were going to protect them from the sound that they were going to be exposed to, and 3M and Aearo knew that there was no data to back that up. And, so it would be very odd to suppose that the bankruptcy system is now going to displace the entire civil justice system, which would enable juries to consider evidence of individual members and all of the other evidence attended to the civil justice system and say --

THE COURT: I'm --

MR. FREDERICK: -- we're going to put everybody in a big lot.

THE COURT: To go by your brief and many of the amicus briefs, that's the question. But, why wouldn't the bankruptcy judge relinquish jurisdiction rather than try to resolve a whole bunch of proceedings that otherwise would be in the province of the State Courts or the Article III Courts? We obviously aren't there yet, but to make a simple assumption that the bankruptcy judge will resolve all of the tort cases seems heroic.

MR. FREDERICK: Your Honor, the question before you is whether the --

THE COURT: I know what's before us, but I'm not asking about that.

MR. FREDERICK: No, I understand that, but --

THE COURT: I'm asking why you're assuming that the alternatives are to resolve the tort claims in the MDL or to resolve them in the Bankruptcy Court with no jury and so on? Why isn't relinquishing jurisdiction a likely, if not, the required outcome?

MR. FREDERICK: Well, we believe it is, if what you mean by relinquish jurisdiction is for the Bankruptcy Court to say that --

THE COURT: Send it to a district judge.

MR. FREDERICK: That is correct and that is where it is now.

THE COURT: In light of Article III concerns.

MR. FREDERICK: That --

THE COURT: That's another line of Supreme Court cases.

MR. FREDERICK: And we're in accord with the notion that this was an improperly brought bankruptcy. In two weeks the Bankruptcy Court will be conducting a hearing on a motion to dismiss --

THE COURT: For all I know, the Bankruptcy Court might relinquish jurisdiction, send it to a district judge, and the panel on multi-district litigation would send it all to Florida.

MR. FREDERICK: Well, I'm not here --

THE COURT: And, we would have had a very long and interesting excursion.

THE COURT: In other words, send it to a district judge in Indianapolis who would --

THE COURT: Yes.

THE COURT: -- where the JPML would then --

THE COURT: It has an element of circularity to it. The prospect --

MR. FREDERICK: I'm not here to argue about the MDL process. I'm here to rebut the arguments that have been made to extend a stay to this parent corporation that has the ability and has been taking sole responsibility for four years in litigating, and it took that position because it felt that it was in its economic interest to do so. Why? Because under many states' laws, non-economic damages get capped at $1 million per defendant. There were multiple Aearo defendants along with 3M. Aearo proceeded to be in its interest -- sorry, 3M proceeded to be in its interest to take sole responsibility and it litigated on that basis throughout the entirety of the MDL process, and so when --

THE COURT: And do you agree that the -- I mean, it sounded to me as though the MDL process was on hold largely because 3M stopped doing things, but is there a formal order in place?

MR. FREDERICK: There is an appeal that has been

taken from a sanctions order issues by the MDL judge against 3M for changing its position four years into the litigation in saying never mind that we have said we were going to defend these, it's actually on Aearo, it's Aearo's fault. And, the judge sanctioned 3M for that change of position on which everyone had relied for four years and that appeal is up on the -- on appeal to the Eleventh --

THE COURT: That's the one that's awaiting the Eleventh Circuit's --

MR. FREDERICK: That's correct, and there's been an administrative say for purposes of allowing that appeal to go forward.

THE COURT: And that's a stay by Judge Rogers?

MR. FREDERICK: That's correct.

THE COURT: Yes.

MR. FREDERICK: That's correct. But, I think that further to your point, Judge Wood, about the 105(a), whether you view this from jurisdictional perspective as these aren't really related to because they aren't going to affect the partition of the creditors or you view it from the Bankruptcy Court's perspective that the Judge also would not issue a 105(a) injunction, which is a discretionary standard because it would not advance the purposes of the reorganization, I think you get to the same place, and if you were to say that there is some unusual circumstances inquiry to be done here, you

wouldn't find that as a matter of fact for the reasons that the Bankruptcy Court gave, which is that there are no immediate economic adverse consequences by allowing this funding agreement because the estate -- Aearo's estate is going to be taken care of for purposes of the creditors and for whatever reorganization purposes Aearo was seeking to achiever, other than protecting its parent company from MDL litigation.

THE COURT: So, that takes us back really to the key finding that the bankruptcy judge made, which was that this was just a circular exercise with no real economic impact.

MR. FREDERICK: That's correct. And, I think for that reason, you know, it is important to understand from the creditor's perspective, and that's who I'm representing in this argument, from the creditor's perspective, if the funding agreement means what it says and if the 3M executives correctly said they would be responsible for those payments, the creditors are going to be taken care of.

Now, Mr. Clement makes an exhaustion argument. Judge Hamilton, you're correct, the word exhaustion does not appear in the funding agreement, and what 3M has -- or Aearo has ignored, is that the provision under the permitted funding use has the words projected to be, so it's insufficient or projected to be insufficient, and Mr. Stein testified at the bankruptcy hearing that he believed that the Aearo people could make that projection if circumstances warranted, and so the

question is not whether or not there's a problem about taking the assets all the way down to nothing. The question from the creditor's perspective is, are they going to be paid by the invocation of this permitted funding use request for 3M to actually pay those claims.

So, if there's an exhaustion problem at all, it doesn't affect the creditors. It might affect the stockholders, except that 3M wholly owns Aearo, and so as a matter of equity, we're talking about the difference between the equity of whatever value there is for 3M in that exercise versus what the creditors would be able to get out of a successful reorganization. And, so for all these reasons, this circularity, it is important for the Court to disavowal the idea that wealthy corporations can get around their civil justice system requirements and demands by invoking the bankruptcy code in seeking to extend the stay provisions to that action.

I'm happy to address the text of (a)(1) and (a)(3) if the Court has questions about it, but we do think that these are not provided in (a)(1). The Bankruptcy Court was right to say that more recent cases, 30 years after Robins, have properly situation any exceptions under 105(a) where there is more discretion, and we read the Cesar's (phonetic) opinion from this Court as saying that 105(a) can't contravene a particular bankruptcy provision, but it can work in

complimentary fashion to the protection of the estate, and so to the extent that there is a concern there, we think that the discretion exercised by the Bankruptcy Court more than satisfies it.

THE COURT: Mr. Frederick, can I ask you, suppose the facts were to change in the next year or two, the MDL proceedings get worse and worse for the defendants, maybe there are larger economic shakeups in the world, and 3M's credit rating drops and the promise of funding starts to look a lot shakier, can you imagine circumstances in which the kind of relief 3M is seeking now or that Aearo is seeking on behalf of 3M, could become permissible?

MR. FREDERICK: I think it would be hard to imagine and I will give you the historical example of the asbestos cases from Johns Manville in the 90s and the A.H. Robins case itself, which involved years, and years, and years, of litigation that was directed against the parent, in which the parent ultimately concluded it had to go into bankruptcy. It's hard for me, Judge Hamilton, sitting here today knowing what is on 3M's balance sheet and its boast that for 64 consecutive years it has increased its dividends to imagine a situation in which it would not be able to meet its financial obligations and have to declare bankruptcy, but if it did, the point of the bankruptcy process is to take the bitter with the sweet. 3M would have to disclose all of its information. It would have

to subject itself to the bankruptcy process, if there were financial grounds in which to do so. 3M would have to comply with all the other requisites of the bankruptcy process. But, in our view, it can't do that by hiding behind and pushing or prodding a wholly-owned subsidiary to do its work for it.

THE COURT: Thank you.

MR. FREDERICK: If the Court has no further questions, we submit.

THE COURT: Thank you, Mr. Frederick. Mr. Janda?

MR. JANDA: Thank you, Your Honor, and may I please the Court, Sean Janda for the United States Trustee. So, there's been a lot of discussion today about the specific provisions at issue in this case and I'm happy to address any remaining questions that the Court has about those provisions, but in the absence of specific questions, I think it might be helpful just to take a step back and make a couple of fundamental points about the sort of power that Aearo was asking the Bankruptcy Court to exercise here and the problems that we, as the United States Trustee, have with that.

So, first, I think it's important to emphasize through the extraordinary nature of this sort of 105 injunction. It interferes, if it's entered, with ongoing proceedings in other Article III Court, maybe ongoing proceedings in State Court, and even if it doesn't sort of, ultimately, stop tort claimants from resolving their claims

through the civil tort system that congress has established, it certainly interferes with that process that delays that process.

And, you know, candidly, we think Fisher establishes that the 105 injunction in this circuit maybe appropriate in some circumstances, but I think both the extraordinary nature of that power and the Supreme Court's recent repeated clarity that 105 is not sort of a roving commission to do equity, has to be tailored quite closely, that any exercise of power under 105 has to be tailored to the specific provisions of the bankruptcy code that the Court is trying to implement, really help underscore the very high bar that Aearo would have to meet before it could justify the exercise of that power.

THE COURT: So, let me ask you a question. The Supreme Court has indeed said those things about the bankruptcy code, but the other thing the Supreme Court has been on a campaign about is to make sure that we don't classify all sorts of things as jurisdictional if they really are more of a claims processing nature, and I wonder about the related to assessment here in that light. The Bankruptcy Court thought applying the ex-anti perspective and so forth that related to jurisdiction itself didn't exist. Then there is the paragraph that we've been talking about where the Court says, "And anyway, if I'm wrong about that, I actually would not issue an injunction for all the reasons I've just been discussing for the last so many

pages." So, where do you come down on the jurisdictional or non-jurisdictional nature of the related to question here?

MR. JANDA: So, Your Honor, we think that certainly the related to question that is a jurisdictional question. I think there's a separate merits question about whether 105 authority sort of could or should be exercised in these circumstances, and our reading of this circuit's case law is that the related to definitely jurisdictional aspect, is an ex-anti inquiry, but one that really requires from the ex-anti perspective, an actual affect on the bankruptcy estate, and we don't think that's been shown here.

I mean, to the extent that the Court disagrees about how best to read this Court's precedents and thinks the bar is something lower than that, then we think sort of for almost exactly the same reasons, the Court -- the Bankruptcy Court was correct to say that it would in any event not exercise whatever jurisdiction it might have.

THE COURT: Yes, I was --

THE COURT: I'm not sure you're getting Judge Wood's question. It's one of mine, too.

THE COURT: You can retry it.

THE COURT: And perhaps it would help just to mention the cornerstone here, which it Bell against Hood, right. To have jurisdiction, you have to make certain allegations and make a claim of a certain kind, but the Supreme Court has said

failure to prove your claim just means you lose. It doesn't mean retroactively you had no jurisdiction. And, it seems, one could understand what the bankruptcy judge is saying is, well, they failed to prove their claim, therefore retroactively there's no jurisdiction. I wonder if that's where you think the Supreme Court is these days on jurisdiction versus substance?

MR. JANDA: So, that's not how we read the Bankruptcy Court's opinion and that's not how I think we would read Bush, certainly. What we read the Bankruptcy Court to being saying is that sort of on the sort of facts before me, I can't find this sort of effect that would be required to exercise jurisdiction under 105 --

THE COURT: Yes, and so why doesn't that just mean the party making this assertion loses, and then you cite Bell against Hood?

THE COURT: Right, and that was kind of where I was going, because I'm having trouble seeing much sunlight between your jurisdictional argument and your merits argument, which might mean that it's actually a merits argument, in which case you would say, yes, jurisdiction is all right. There's an allegation of an impact on the estate. There are allegations and everybody's arguing here and there. And, the bankruptcy judge is just saying I just don't think there's enough of an impact. You haven't persuaded me. Maybe even if there's any

and so I'm going to make you lose on the merits.

MR. JANDA: So, that's just not how we read this Court's precedents. I mean, I don't want to fight the Court to hard on this because I think we are perfectly comfortable saying that on the merits the 105 power shouldn't have been exercised and we think, as you said, the questions really do merge in this context, at least sort of the threshold merits question, that the Bankruptcy Court resolved the 105 issue on in the alternative, but that's just how we read this Court's precedents and I think if the Court disagrees, then a merits determination of the Bankruptcy Court could be affirmed.

THE COURT: Okay, thank you.

MR. JANDA: Thank you.

THE COURT: Thank you, counsel. Mr. Clement anything further?

MR. CLEMENT: Yes. I'd like to make three very quick points. Three points in two minutes. First, you can look at 272(a) of the joint appendix and you will find no contradiction with anything I have said here today. All that says is 3M will represent that it will pay, but the question is what does it have to pay, and the important point to keep in mind is that it doesn't have to pay as long as Aearo has its own resources and they have to use those first, and it doesn't use the word exhaust, but it does use the word solely to the extent that.

And the projected to language -- this is my second

point, the projected to language doesn't sort of create some loophole or make that language not say what it actually says. That just means that if Aearo projects that it's about to get $20 million in new revenues in, it has to take that into account and can only ask for reimbursement from 3M to the extent that its on-hand resources that it projects to have, gets it down.

There's a $5 million cushion. But, that's why, if you go to our reply brief and there's the example. If there's an indemnification obligation for a billion, they have a $100 million in cash or projected cash, they can only make a reimbursement request for $905 million. That's why the estate is better off with the litigation stayed against 3M.

But, here's my last point and just gets to this discussion you were just having about jurisdiction versus the merits. So, there are important distinctions between jurisdiction and the merits and it's worth getting it right. I think one of the distinctions is that if it's jurisdictional you have to figure it out at the beginning of the case. That's why the bush case says that it's an ex-anti inquiry and that's why the ex-anti inquiry is to potential economic effect, not actual economic effect, which is why the Bankruptcy Court got an important question 100 percent wrong, and it would be fine -- again, as I said, I don't want to lose this appeal, but if I have to lose this appeal, I would really like to lose this

appeal on the ground that the Bankruptcy Court was wrong about jurisdiction, we'll affirm him because he probably meant to exercise some discretion, and that way, if the circumstances change, he could revisit it, but also that way, if you have a different case where there's a channeling injunction or something else where related to jurisdiction matters, the hands won't be tied. Thank you very much.

THE COURT: Thank you, counsel. The case is taken under advisement.

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C E R T I F I C A T I O N

I, WENDY ANTOSIEWICZ, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of my ability.

/s/ Wendy Antosiewicz

WENDY ANTOSIEWICZ

J&J COURT TRANSCRIBERS, INC. DATE: April 11, 2023